Petition

81-1420

Office - Supreme Court, U.S.
FILED
JAN 27 1982
ALEXANDER L. STEVAS,
CLERK

No. _____

THE SUPREME COURT OF THE UNITED STATES
October Term 1981

ELIZABETH R. STILL for herself and all others similarly situated,

Petitioner

vs

PERSONNEL BOARD OF JEFFERSON COUNTY; JOSEPH W. CURTIN, individually and as Director of the Personnel Board; HENRY JOHNSTON, JAMES JOHNSON, and HIRAM MCKINNEY, individually and as members of the Personnel Board,

Respondents

On Writ of Certiorari to the Supreme Court of Alabama

PETITION FOR WRIT OF CERTIORARI

Edward Still
Suite 400 Commerce Center
2027 1st Avenue North
Birmingham, Alabama 35203-4168
205/322-6631
(Attorney of record)

Neil Bradley
52 Fairlie Street NW
Atlanta, Georgia 30303
404/523-2721

Attorneys for Petitioner

QUESTIONS PRESENTED

When a plaintiff elects to proceed in state court to have two state statutes declared unconstitutional on both state and federal grounds, and when the court grants all relief requested on state statutory and constitutional grounds without reaching the federal claims, may the State trial court deny attorneys' fees requested under 42 USC §§1973 and 1988?

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REPORTS OF CASE

The decision of the Alabama Supreme Court is reported at ___ So2d ___ and is reproduced in the Appendix at A1.

JURISDICTION

The Supreme Court of Alabama rendered its decision in this action on 14 September 1981 and denied a timely application for rehearing on 30 October 1981 (A65). The jurisdiction of this Court is based upon 28 USC §1257, paragraph (3).

STATUTES INVOLVED

A. The Voting Rights Act Amendments of 1975, Section 14:

> In any action or proceeding to enforce voting guarantees of the fourteenth or fifteenth amendment, the court in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.
>
> Pub. L. 93-73, Title IV §402, 6 August 1975, 89 Stat. 402, 404, codified as 42 USC §1973 l (e).

B. The Civil Rights Attorney's Fees Awards Act of 1976.

> In any action or proceeding to enforce a provision of sections 1981,

1982, 1983, 1985, and 1986 of this title [42, US Code],* * * the court, in its discretion may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Pub. L. 94-559, §2, 19 October 1976, 90 Stat. 2641, codified as 42 USC §1988 (last sentence).

C. Act 819, 1978 Regular Session, Alabama Legislature, Section 1:

(A) No person in the employment of any city, whether classified or unclassified, shall be denied the right to participate in county and state political activities to the same extent as any other citizen of the State of Alabama, including endorsing candidates and

contributing to campaigns of his choosing.

(B) No person in the employment of any county, whether classified or unclassified, shall be denied the right to participate in city and state political activities to the same extent as any other citizen of the State of Alabama, including endorsing candidates and contributing to campaigns of his choosing.

(C) No person in the employment of the State of Alabama, whether classified or unclassified, shall be denied the right to participate in city or county political activities to the same extent as any other citizen of the State of Alabama, including endorsing candidates and contributing to campaigns of his choosing.

(D) All persons in the employment of any city or county shall have the right to join local political clubs and organizations, and state or national political parties.

(E) All persons in the employment of any city or county shall have the right to publicly support issues of public welfare, circulate petitions calling for or in support of referendums, and contribute freely to those of his choosing.

D. Jefferson County Civil Service Law, Ala Code Appx §669 (1958 Recomp):

* * * No employee shall be a member of any national, state or local committee of a political party, or an officer of a partisan political club, or a candidate for nomination or election to any public office, or shall take any

part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen privately to express his opinion and to cast his vote. * * *

STATEMENT OF FACTS

From 1945 to 1978 the Jefferson County Personnel Board utilized its authority under the provisions of the Jefferson County Civil Service Law, Section 25 to prohibit all political activities by public employees under its jurisdiction except voting and private expressions of opinion. In 1978 the Alabama Legislature adopted Act 819 which appeared to be inconsistent with Section 25 of the Civil Service Law. About two months after Act 819 was adopted, the Jefferson County Personnel

Board posted a Special Bulletin addressed to all classified employees. The Bulletin stated:

> Pursuant to the advice of our legal counsel, the Board challenges the constitutionality of Act No. [819], of the State Legislature.
>
> Our Civil Service Law, and the Rules and Regulations dealing with political activity and the prohibitions therein, is [sic] in force.
>
> Any employee who engages in activities in violation of these provisions shall be subject to disciplinary action in accordance therewith.

The disciplinary action referred to in the Bulletin is dismissal.

Mrs. Still's complaint contended that the policy announced in the Bulletin was inconsistent with Act 819 and violated her constitutional rights to free speech and association. The suit also alleged that the Civil Service Law and Act 819 denied equal protection because civil servants were prohibited from

participating in campaigns for federal or political party office while being allowed to participate in state, county, or local campaigns.

The Jefferson County Circuit Court took all evidence from the pleadings or submissions and successively granted over the next year and a half, a temporary restraining order, preliminary injunction, and permanent injunction. The plaintiffs were also certified as representatives of the class of public employees under the jurisdiction of the defendants.

On 20 February 1980, the Circuit Court entered its final judgment declaring the rights of the parties and enjoining the defendants to refrain from interferring with the free speech and associational rights of the class represented by Mrs. Still. Specifically,

the Court held that Act 819 of the Regular Session pro tanto repealed Section 25 of Act 248 of the 1945 Regular Session (the Jefferson County Civil Service Law) and forbade the defendants from interferring with the rights granted by Act 819 to engage in campaigns for political candidates (Final Judgment, A42-3).

In that Judgment the Court granted plaintiffs' request for attorneys' fees but reserved for later decision the exact amount. The Court held that it did not have the authority under federal law to grant fees, but it did have authority under the common benefit principle (Final Judgment, A43-52). When the plaintiff moved for an award of attorney's fees, the parties stipulated on an amount that would be reasonable, but without prejudice to the defendants'

right to contest the authority for the award or the correctness of the underlying judgment.

Instead of granting the request for attorney's fees, the Court granted the Personnel Board's motion to reconsider and held that the common benefit principle in Alabama required that the creation or preservation of a fund from which fees could be paid and denied the request for attorneys' fees (Amendment to Final Judgment, A57). --

MANNER OF RAISING FEDERAL CLAIMS

The complaint alleged jurisdiction "under the First and Fourteenth Amendments to the Constitution of the United States, 42 USC §1983," and several state causes of action. Specifically, the amended complaint stated as two of its three causes of action the following:

First Cause of Action

9. The Special Bulletin of 30 June violates the right of plaintiffs and the class they represent in that it attempts to restrict the political activities of public employees beyond the compelling need of the State, in violation of the First and Fourteenth Amendments to the Constitution of the United States, Section 5 of the Constitution of Alabama, and 42 USC §1983.

* * *

Third Cause of Action

11. The literal term of Act 819, read in conjunction with the Civil Service Law applicable to Jefferson County, will allow the defendants to prohibit civil for the election of candidate to federal and political party offices. Such a restriction denies plaintiffs and their class equal protection of laws in violation of the Fourteenth Amendment to the United States Constitution and deprives them of the freedom of speech and association in violation of the First and Fourteenth Amendments to the United States Constitution and Section 5 of the Constitution of Alabama. (The Attorney General of Alabama shall be served with a copy of this amended complaint in order that he may defend the constitutionality of these State laws).

The trial court held that the Bulletin mentioned in the First Cause of Action

> does nothing more than state the position of the Board in regard to the contended validity of Act No. 819 and the continued effectiveness of the Civil Service statute and the Board's rules as they apply to political activity [and therefore] does not present a justiciable controversy.

Final Judgment, A15. With regard to the Third Cause of Action, the trial court avoided a constitutional ruling by holding that the Act could be interpreted to grant public employees the right to participate in federal and political party campaigns, even though they were not explicitly mentioned in the statute.

Mrs. Still's notice of appeal stated that she appealed "from the amended final judgments denying attorneys' fees and denial of relief

under U.S. Constitution."

On appeal, the Alabama Supreme Court held as follows:

> The question presented is whether a party that asserts both a federal and a state cause of action and does not prevail on the federal cause but does on the state cause, is entitled to an award of attorneys' fees under the federal statute. Our answer to this question is in the negative. * * * It is our opinion that a state court is not required to award attorneys' fees to a party that prevails on state grounds only, regardless of what other federal claim is attached thereto.

A7-8. The Court also erroneously stated that the only federal claim had been held non-justiciable by the trial court. In her petition for rehearing Ms. Still noted that she had made an explicit claim of federal rights at two places in the complaint, in support of separate theories of relief, and that the trial court had not ruled on one of them (A66).

The Supreme Court of Alabama denied the petition for rehearing on 30 October 1981 (A65).

REASONS THE WRIT SHOULD BE GRANTED

I. A State court should grant attorneys fees when it decides a case on a state theory while not reaching a federal theory.

Under either section 14 of the Voting Rights Acts of 1975, or the Civil Rights Attorneys Fee Awards Act of 1976, a federal court holding that the Civil Service Law of Jefferson County and Act 819 unconstitutionally restrict voting and campaigning by public employees would have the authority to award attorney's fees. The Circuit Court of Jefferson County likewise has the authority because the attorney's fees are part of

the remedy provided by Congress. Maine v Thiboutot, 448 US 1, 11 (1980).

The Circuit Court granted all the relief requested by the plaintiffs but did so on state causes of action and not federal ones. 1/ The Circuit Court was following long-standing precedent in Alabama that its courts will construe statutes in reasonable ways that will avoid constitutional defects. See, e.g., Pruett v Patton, 288 Ala 710, 265 So2d 130 (1972). This, however, should

1. The Alabama Supreme Court erroneously stated that there was no substantial federal issue (A4-5). This error of fact was brought to the Court's attention in the petition for rehearing (A66). The refusal of the Alabama Supreme Court to change its decision should be viewed as a reaffirmation of its literal holding that "a state court is not required to award attorneys' fees to a party that prevails on state grounds only, regardless of what other federal claim is attached thereto" (A8). The plaintiff reserves the right to argue that she should have prevailed on her federal claims, if that is a necessary prerequisite to being awarded attorneys' fees.

not stand as an impediment to the granting of fees. Congress specifically considered this situation when it was adopting the Civil Rights Attorney's Fees Awards Act of 1976. The House Committee stated,

> To the extent a plaintiff joins a claim under one of the statutes enumerated in [the with a claim that does not allow attorney fees, that plaintiff, if it prevails on the non-fee claim, is entitled to a determination on the other claim for the purpose of awarding counsel fees. In some instances, however, the claim is dispositive. In such cases, * * * attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a "common nucleus of fact.

HR Rep No. 94-1558, 94th Cong. 2d Sess. 4 n.7 (1976) (citations omitted). This portion of the legislative history quoted with approval in Maine v Thiboutot, supra, at 10 n.10 and

Maher v Gagne, 448 US 122, 132 n.15 (1980).

The Sixth Circuit has granted a fee in a case decided on a state cause of action even where the trial court ruled against plaintiffs on their federal law theory. Seals v Quarterly County Court, 562 F2d 390 (6th Cir 1977), reasoned that the "common nucleus of fact" between the state and federal claim authorized fees even though the federal claim had not been successful. There the trial court had ruled against the plaintiffs on their federal cause of action, but had granted the relief requested on an alternative state theory. The Sixth Circuit declined to review the ruling on the federal claim because it would amount to an advisory opinion, but allowed an award of fees under 42 USC §1988, based upon their

reading of the legislative history cited above.

Although Maher v Gagne did not explicitly decide this question, its reasoning supports the rationale of Seals. The plaintiff in Maher challenged a Connecticut welfare regulation on grounds of conflict with federal statutes and the Fourteenth Amendment. The parties reached a settlement, and a consent decree which "did not purport to adjudicate respondent's statutory or constitutional claims" was entered by the trial court. 448 US at 126 n.8. The district court then awarded fees under 42 USC §1988. The State appealed, partly on the grounds that the statute did not authorize a fee unless a federal constitutional violation had been found by the court. In rejecting this defense, this Court held,

> In this case, there is no need to reach the question whether a federal court could award attorney's fees against a state based on a statutory, non-civil-rights claim. For, contrary to petitioner's characterization, respondent did allege violations of her Fourteenth Amendment due process and equal protection rights, which the District Court and the Court of Appeals both held to be sufficiently substantial to support federal jurisdiction under Hagans v Lavine, 415 US 528 [1974]. Although petitioner is correct that the trial judge did not find any constitutional violation, the constitutional issues remained in the case until the entire dispute was settled by the entry of a consent decree.

Maher v Gagne at 131-2.

This Court should grant certiorari to decide whether the Maher v Gagne holding should apply if the federal claim "remained in the case until the entire dispute was settled" (or decided by the trial court), but the state claim was the basis of decision. We suggest that the Alabama Courts have

decided this issue contrary to the holding of Maher v Gagne and should be reversed.

II. Other States' appellate courts have granted fees to successful litigants under the Civil Rights Attorneys Fees Awards Act.

Under our federal system, state claims may sometimes be brought in federal courts as pendent claims or in diversity cases. In such situations, the federal court must be bound by the substantive state law. Likewise, Congress has provided many private causes of action based on federal statutes may be brought in federal or state court. Two not uncommon examples are the Fair Labor Standards Act, 29 USC §201 et seq, and the Truth in Lending Act, 15 USC §1601 et seq.

While many state courts have granted fees under §1988, see Maine v Thiboutot, supra, at 10 n.11, for list of such cases, only recently have state courts begun to discuss the availability of fees under §1988 where the plaintiff prevails on a state, but not a federal, claim. Two state appellate courts have ruled that fees are to be granted and two have ruled against the proposition.

In Draper v Town Clerk of Greenfield, 425 NE2d 333 (Mass 1981), the plaintiffs challenged on state and federal constitutional grounds the interpretation of a state birth certificate law that prohibited the registration of the name of the father of an illegitimate child born between 1969 and 1977. The plaintiffs prevailed when the state court adopted the

construction that the 1977 amendment to the law applied to all births, regardless of date. The Supreme Judicial Court upheld the granting of attorneys' fees under 42 USC §1988 even though the federal claim had not been reached.

In Ward Lumber Company v Brooks, 273 SE2d 331 (NC App 1981), the Court held that attorneys fees were to be granted even if the trial court did not address the §1983 claim because of a substantial claim under §1983 and a common nucleus of operative facts. 2/

Two state appellate courts have refused to grant fees under §1988 in situations where the relief was

2. The court did not grant fees because it held the plaintiff was not the prevailing party. This Court has recently denied certiorari on that issue. Ward Lumber Co v Brooks, No 81-241, cert. denied. 50 USLW 3465 (7 December 1981).

granted on the basis of state law. Application of Roberts, 291 Or 21, 628 P2d 714 (1981) (In Banc) (habeas corpus relief was granted solely on the construction and application of state statutes); In re Kaplan, 178 NJ Super 487, 429 A2d 590 (NJ Super. App. Div. 1981) (failure to prevail on basis of federal claim was alternative ground for denying fee; others were untimeliness of fee application and failure to establish elements of §1983 action).

Despite the Alabama courts' willingness to take cases brought under 42 USC §1983, 3/ their unwillingness to grant fees on an equal basis with federal courts will have the

3. The Alabama Supreme Court has recently instructed the trial courts that they must accept cases brought under 42 USC §1983. Terrell v City of Bessemer, ___ So2d ___, 15 Ala. Bar Rep. 2329 (Ala 1981).

inevitable effect of encouraging litigants to take their civil rights actions to federal court. This shift in the case load will have a relatively greater impact on Alabama's 12 federal judges than on its 111 state circuit judges. Additionally, as this Court noted in Maine v Thiboutot, 448 US at n.12,

> If fees were not available in state courts, federalism concerns would be raised because most plaintiffs would have no choice but to bring their complaints concerning state actions to federal courts.

We suggest that state courts are better able to avoid federal-state conflicts by interpreting their own laws to avoid constitutional problems. State courts therefore should be kept equally available to litigants with federal claims which are outside the

exclusive jurisdiction of federal courts.

The refusal of the Alabama Supreme Court to allow trial courts to award attorneys' fees in cases involving both state and federal claims when the plaintiff does not prevail on the federal claim (either through an adverse ruling or by winning on state claims with no ruling on federal issues) puts Alabama at odds with other State courts which have decided this issue. The Supreme Court should grant certiorari to resolve this conflict in the state courts.

CONCLUSION

The Court should grant certiorari and hear argument on this matter to resolve when attorneys' fees must be granted by state courts hearing federal claims. In the alternative, the Court could remand the action to the Alabama Supreme Court for decisions on each federal claim raised in the complaint.

Submitted by,

Edward Still
Suite 400 Commerce Center
2027 1st Ave. North
Birmingham, Alabama 35203-4168

Appendix

THE STATE OF ALABAMA - - - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

SPECIAL TERM, 1981

79-824

Elizabeth R. Still, et al.

v.

Personnel Board of Jefferson County, et al.

Appeal from Jefferson Circuit Court

[11 September 1981]

ALMON, JUSTICE.

This is an appeal from a judgment denying the award of attorneys' fees.

Two classified civil service employees, as representatives of a class, sought an injunction and declaratory relief to determine the scope of the restrictions on their political rights contained in Code 1975, §17-1-7, as they conflict with similar restric-

tions in the civil service law of Jefferson County. The Jefferson County Personnel Board adopted as its own rule the same restrictions contained in the civil service law entitled Rule 10, "Prohibited Activity."

In essence, the rule prohibits a classified employee from participating in any national, state or local political activities or campaigns "except to exercise his right as a citizen privately to express his opinion and to case his vote." In comparison, §17-1-7, passed during the 1978 Regular Session, provides that the employees shall have the right to participate in city and state political activites as any other Alabama citizen, except they are prohibited from engaging in political activities on the same level of government in which they are employed. This

section also permits them to join local political clubs and organizations and state or national political parties. Recognizing the conflict between these two acts, the Personnel Board posted a Special Bulletin, as notice to its employees, that it challenges the constitutionality of §17-1-7, believing that the restrictions in its Rule 10 are in force, and that any violation of that Rule will be subject to disciplinary action.

Plaintiffs brought an action to enjoin the Personnel Board from denying them their political rights granted under §17-1-7. The first cause of action alleged that the Special Bulletin violated the 1st and 14th Amendments to the United States Constitution, Section 4 of the Alabama Constitution and 42 U.S.C. §1983. The

second count asserted that the Special Bulletin, Personnel Board Rule 10 and the civil service law violated §17-1-7. Lastly, they alleged that when read together, §17-1-7 and the civil service law denied them their right to campaign for political parties or federal offices, violating the equal protection and freedom of speech and association clauses of the United States and Alabama Constitutions. They requested costs and reasonable attorneys' fees in their prayer for relief.

The court, in its decree, specifically stated that "according to the positions and contentions of the parties, the bulletin itself does not present a justiciable controversy." Hence, the Plaintiffs' first cause of action, the only cause that asserted federal statutory violations, was held

not justicable. The court further stated that §17-1-7 is constitutional as applied to the parties; that the provisions of Rule 10 and the civil service law that were inconsistent or contradictory with §17-1-7 were re-apealed; and that public employees subject to the provisions of §17-1-7 were entitled to engage to political campaigns for political party and federal offices. The court initially awarded attorneys' fees based upon the "private attorney general/benefit theory." However, the court subsequently decided the Plaintiffs were not entitled to such fees and amended its final judgment to so reflect.

In their brief the Plaintiffs properly state the issue to be as follows:

> May an Alabama court grant attorneys' fees under the authority of a federal statute, even when its decision to grant all relief sought is based on state causes of action than federal ones?

The first case relied on is Maine v Thiboutot, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed. 2d 555 (1980). The precise issue in Thiboutot was whether 42 U.S.C. §1983 encompasses claims based on purely statutory violations of federal law and if so, whether attorneys' fees under 42 U.S.C. §1988 could be awarded the prevailing party when the action was filed in state court. The United States Supreme Court answered in the affirmative.

The second case relied on by the Plaintiffs is Maher v Cagne, [sic] 448 U.S. 122, 100 S.Ct. 2570, 65 L.Ed. 2d 653 (1980). Maher dealt with the issue as to whether a court's authority to award attorneys' fees is limited to cases

where §1983 is invoked as a remedy for a constitutional violation or a violation of federal statute providing for the protection of civil rights or equal rights. The violation in Maher concerned the Social Security Act. Neither case relied on addresses the precise issue presented here. In this case, the only alleged violation of a federal statutory right involved the Personnel Board's Special Bulletin. The court specifically considered the allegation and held it did not present a justiciable controversy. Hence, this case is distinguishable from the two cases cited.

The question presented is whether a party that asserts both a federal and a state cause of action and does not prevail on the federal cause but does on the state cause, is entitled to an

award of attorneys' fees under the federal statute. Our answer to this question is in the negative. The Plaintiffs have not cited any case, nor have we found a case, where a state court awarded attorneys' fees under a federal cause of action when the party did not prevail on such action. It is our opinion that a state court is not required to award attorneys' fees to a party that prevails on state grounds only, regardless of what other federal claim is attached thereto. Shelby County Commission v Smith, 372 So. 2d 1092 (Ala. 1979).

The trial court's decision is not based on constitutional grounds but merely on the language of §17-1-7. As such, there is no federal statutory or constitutional grounds to allow the award of attorneys' fees.

Therefore, the judgment denying Plaintiffs' attorneys' fees is affirmed.

AFFIRMED.

Torbert, C. J., Faulkner and Embry, JJ., concur.

Jones, J., concurs specially.

CIRCUIT COURT, TENTH JUDICIAL CIRCUIT
OF ALABAMA

EQUITY DIVISION

CASE NO. CV 78 503-740 WAT

ELIZABETH R. STILL and BILLY GRAY, for themselves and all others similarly situated,

Plaintiffs

VS.

PERSONNEL BOARD OF JEFFERSON COUNTY; JOSEPH W. CURTIN, individually and as Director of the Personnel Board; HENRY JOHNSTON, JAMES JOHNSON, and HIRAM McKINNEY; individually and as members of the Personnel Board.

Defendants

[20 February 1980]

FINAL JUDGMENT

This is an action by the Plaintiffs, Elizabeth R. Still and Billy Gray, individually and as class action representatives, against the Personnel Board of Jefferson County, its director and board members, seeking preliminary

and permanent injunctive relief against the enforcement of a bulletin and rule of the Board and the statutory origin of the rule prohibiting certain political activity by classified employees of Jefferson County and certain municipalities within the County. The action seeks a declaratory judgment in respect to the scope of Act No. 819 of the 1978 Regular Session of the Legislature relating to the rights of all City, County and State employees to participate in certain political activities.

The Plaintiffs, Still and Gray, were certified by the Court as representatives of the class of classified employees of Jefferson County and the municipalities, respectively, subject to the jurisdiction of the Personnel Board. Still is employed by Jefferson County as

a senior probation officer for the Family Court and Gray is employed by the City of Birmingham as a firefighter.

The action was certified as an appropriate class action pursuant to the provisions of Rule 23(b)(2) of the Alabama Rules of Civil Procedure and this judgment shall be applicable to all classified employees, county and municipal, who are subject to jurisdiction of the Personnel Board of Jefferson County.

During prior proceedings, the Court entered a preliminary injunction against the Defendants enjoining them from enforcing Rule 10 of the Board or Section 25 of the Civil Service law applicable to Jefferson County in respect to classified City employees participating as workers in campaigns for political party offices and County,

State or Federal elections and classified County employees participating as workers in political party offices or City, State or Federal elections.

The Plaintiffs have moved for summary judgment upon the issues that Section 25 of the Civil Service law has been amended by Act No. 819, 1978; that the Personnel Board has attempted to restrict the activities of public employees beyond the compelling need of the State; and that said Section 25 as amended by Act No. 819 prohibits public employees from participating in campaigns for election of candidates to federal and political party offices in violation of the State and Federal Constitutions.

The Defendants have moved for judgment on the pleadings.

Upon consideration of the matters presented, the Court is of the opinion

that there is presented no genuine issue as to any material fact and that an adjudication of this action rests solely upon questions of law. Rule 56, Alabama Rules Of Civil Procedure.

SPECIAL BULLETIN OF PERSONNEL BOARD
(Plaintiffs' First Cause of Action)

On June 30, 1978 the Personnel Board issued to its affected agencies a special bulletin directed to all classified employees regarding political activities (Exhibit C to complaint). This document stated that on advice of counsel the Board challenges the constitutionality of Act No. 608 and asserts that the Civil Service law and rules relating to political activity is in force. The bulletin also states that employees in violation thereof will be subject to disciplinary action. The

bulletin is apparently referring to Act No. 819 [Senate Bill 608].

The Plaintiffs aver that the bulletin violates employee rights citing First and Fourteenth Amendments to the Federal Constitution, Section Five of the State Constitution and 42 USC 1983.

It is apparent that the bulletin does nothing more than state the position of the Board in regard to the contended validity of Act No. 819 and the continued effectiveness of the Civil Service statute and the Board's rules as they apply to political activity. According to the positions and contentions of the parties, the bulletin itself does not present a justiciable controversy. The issue actually in dispute is the scope of the Board's authority to continue to regulate and prohibit certain political activity.

This issue is raised by the Plaintiffs' Second and Third cause of action.

VALIDITY OF ACT NO. 819

Act No. 819 of the 1978 Regular Session of the Legislature approved May 4, 1978 provides as follows:

> "To remove all restrictions relating to Public Employees of any County or City in the State of Alabama, pertaining to his right to participate in certain political activities and allow public employees the right of free expression in public welfare.
>
> Be It Enacted by the Legislature of Alabama:
>
> Section 1. (A) No person in the employment of any city, whether classified or unclassified, shall be denied the right to participate in county and state political activities to the same extent as any other citizen of the State of Alabama, including endorsing candidates and contributing to campaigns of his choosing.
>
> (B) No person in the employment of any county, whether classified or unclassified, shall be denied the right to participate in city

and state political activities to the same extent as any other citizen of the State of Alabama, including endorsing candidates and contributing to campaigns of his choosing.

(C) No person in the employment of the State of Alabama, whether classified or unclassified, shall be denied the right to participate in city or county political activities to the same extent as any other citizen of the State of Alabama, including endorsing candidates and contributing to campaigns of his choosing.

(D) All persons in the employment of any city or county shall have the right to join local political clubs and organizations, and state or national political parties.

(E) All persons in the employment of any city or county shall have the right to publicly support issues of public welfare, circulate petitions calling for or in support of referendums, and contribute freely to those of his choosing.

Section 2. No person shall attempt to use his official authority or position for the purpose of influencing the vote or political action of any person. Any person who violates this section of this act shall be guilty of a felony punishable by a fine not to exceed $10,000.00 or imprisonment in the

State penitentiary for a period not to exceed two (2) years, or both.

Section 3. All laws or parts of laws in conflict with this Act are hereby repealed.

Section 4. This Act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law."

Essentially, the Act, in apparent recognition of regulated political activity of public employees, affirmatively provides that city, county and state employees shall not be denied the right to participate in political activities as are other citizens, except that the right is not extended to permit the employee to engage in political activities in the same subdivision of government as his employer. City employees are not granted the right to engage in municipal political activities. The

political activities of county and state employees are similarly expressed. The Act further specifically grants to city and county employees the right to join local political clubs and organizations at all levels of the political strata and the right to publicly support issues of public welfare, petition for and against referendums and make political contributions. The Act further sets forth a repealer clause as to all laws or parts of laws in conflict with the Act.

The answer of the Personnel Board and its members denies the application of the First and Fourteenth Amendments of the Federal Constitution, denies that property or vested rights are involved and denies that a justiciable controversy exists so as to authorize

the Plaintiffs to seek declaratory relief. The Defendants further deny that the Board and the Defendants individually are subject to suit. These denials are made by the Defendants to the Plaintiffs' general averments. The Court notes that the Defendants do not deny that the Board members and director are suable in their representative capacities. The fact that they are proper parties and have been so named makes their individual defense merely a smoke screen and apparently an attempted diversion. This latter denial merits no further consideration.

The gist of the Board's defenses and claims is that Act No. 819 is unconsitutuional and void because it violates Section 45 of the Constitution of the State, that is was not

published as required by Section 106 of the State Consitution and that it is vague and uncertain. The Defendants further contend that the Voting Rights Act of 1965 [42 USC 1973(c)] invalidates Act No. 819 and that the Act is in conflict with Federal Statute 5 USC 1502. Lastly, the Defendants contend that the Plaintiffs cannot accept the benefits of the Civil Service law and then challenge its constitutionality.

The scattergun defenses of the Board appear to the Court as an attempt to obscure the central issue as to whether Act No. 819 supercedes and repeals by inference certain employee political activities placed into the law by prohibitions set forth in Section 25 of Act No. 248 of the 1945 Legislature.

Suffice it to recognize that the Personnel Board Act (Act No. 248), as amended, created a merit or civil service system in counties of the state having a population of 400,000 or more inhabitants for the government and control of all employees of such counties and of the municipalities within such counties having a population of 5,000 or more. The Act is also applicable to certain boards and agencies within the counties involved. [Appendix Section 645, et seq., Code 1958 (Recompiled)]. The Jefferson County Personnel Board was created and operates pursuant to the authority of Act No. 248.

Section 25 of Act No. 248 sets forth a broad range of prohibitions and protections applicable to employees and officials involving political

activities. In substance, these prohibitions are intended to remove the affected employees and their influence from the political arena and to protect them from the spoils system prevalent in some areas of the country in past years. This section provides in part that:

> "No employee ... shall, directly or indirectly, pay or promise to pay any assessment, subscription or contribution for any political organization or purpose, or solicit to take any part in soliciting any such assessment, subscription, or contribution, ... No employee shall be a member of any national, state or local committee of a political party, or an officer of a partisan political club, or a candidate for nomination or election to any public office, or shall take any part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen privately to express his opinion and cast his vote. Any officer or employee under the jurisdiction of this act who violates any of the foregoing provisions of this section shall forfeit his office or position."

Rule 10 of the Personnel Board, promulgated by the Board pursuant to its rule making authority, established as a rule the protections and prohibitions placed into law by Section 25 of Act No. 248.

Are the provisions of Act No. 819 and the conduct proscribed in the Act in conflict with the Personnel Board law (Section 25, Act No. 248)?

The obvious answer is yes. In a broad sense, Act No. 819 grants to public employees the right to participate in political activities to the same extent as other citizens, including endorsing candidates, contributing to campaigns, joining political clubs, organizations, parties, publicly supporting public issues and circulating petitions.

The Personnel Board law prohibits

employees from soliciting or paying political contributions or assessments, being a member of a committee of a political party, being an officer of a partisan political club, being a candidate for nomination or election to any political office and taking part in the management affairs of any political party or campaign.

Having concluded that Act No. 819 is at variance or in conflict with Act No. 248, the next issue to be resolved is whether Act No. 819 is valid generally and whether it is valid when considered in the light of the prior existence of Act No. 248. If Act No 819 is found to be valid, it, upon passage, became the controlling statute applicable to political activity of employees subject to the Jefferson County Personnel System.

The Personnel Board contends that Act No. 819 violates Section 45 of the State Constitution in that the Act contains a subject not clearly expressed in the title of the Act; i. e., that the title does not refer to state employees though one section of the Act clearly does.

Neither Plaintiff Still or Plaintiff Gray is a state employee nor does the Board purport to regulate state employees. It might be concluded in an appropriate proceedings that the Act is void as to state employees, but that issue is not in controversy here and not appropriate for adjudication now.

Even if the provisions of the Act relating to state employees are invalid, the Court is of the opinion that the remaining provisions of the Act regarding

city and county employees can stand the test of severability.

The Act should not be held to be wholly void." . . . unless the invalid portion is so important to the general plan and operation of the law in its entirety as reasonably to lead to the conclusion that it would not have been adopted if the Legislature had perceived the invalidity of the part so held to be unconstitutional." A. Bertolla & Son v State, 247 Ala. 263, 24 So. 2d 23. In the case of City of Mobile v Gaylord Dept. Stores of Alabama, Inc., 276 Ala. 568, 165 So. 118, the Supreme Court of Alabama quoted from the opinion in State ex rel Clark v Carter, 124 Ala. 266, 56 So. 2d 974(6), as follows:

> ". . . Because one section or one provision of an act may be unconstitutional and void does not necessarily render the entire

> statute or enactment void. If the act can be given operation and effect without such void provision, the valid portions of it will be allowed to stand, unless the Court is unable to say or to know that the Legislature would have passed the act without the void provision; but the Court is relieved of any doubt as to this matter by Section 18 of the act in question, which expressly provides that, if any provision of the act shall be void, it shall not affect any other section or provision of the act. [Citations omitted]."

Act No. 819 does not contain a severability clause to aid in its construction as did the act the subject of State ex rel Clark v Carter, but the sections of the Act relating to city and county employees are complete in themselves. The Act, without question, can be given operation and effect without the contended void provisions and section. The Court cannot conclude that the inclusion of state employee political rights is so important to the plan and

operation of Act No. 819 in its entirety to conclude that the Act would not have been adopted without the state employee provisions and section.

As stated above, the Court is of the opinion that even if the contended provisions and section of the Act are void and severed, the Act is not in violation of Section 45 of the Constitution.

The Board next contends and argues that, assuming that Act No. 819 purports to amend Section 25 of the Personnel Board law, then Act No. 819 is in violation of Section 45 of the Constitution on the further grounds that Section 25 as amended was not set out at length. The Board's assumption is apparently based upon the Plaintiffs' construction and argument that Act No. 819 has amended Section 25. The Court

does not accept the Plaintiffs' construction or the Board's assumption.

Act No. 819 does not purport to amend Section 25 or make any reference to it or its codified version set out in Section 669, Appendix, Code of Alabama 1958, Recompiled. Section 45 of the Constitution in such regard is not applicable to acts which are independent and complete and intelligible within themselves. In re Opinion of the Justices, 262 Ala. 345, 81 So. 2d 277; In re Opinion of the Justices, 263 Ala. 653, 83 So. 2d 714; Boyd v Edwards, 284 Ala. 459, 225 So. 2d 853. Act No. 819 is not amendatory in form or substance, but the effect of it upon Act No. 248 is by implication and repeal. For such reasons, the Court concludes that Act. No. 819 is not in violation of Section 45 of the Consti-

tution in such regard.

The Board next contends that Act No. 819 violates Sections 106, 107 and 110 of the State Constitution. The premise of this contention is that the Personnel Board law (Act No. 248) is a local law and that it can only be amended as provided by Section 106.

Section 106 of the State Constitution, within the context of this action, prohibits the Legislature from passing a special or local law without published notice of the intention to apply for such a law.

Section 107 of the State Constitution provides that,

"The Legislature shall not, by . . . local law, repeal or modify any . . . local law except upon notice being given or shown as provided in the last preceding section." (Emphasis added)

Section 110 of the State Constitution provides that,

"A general law within the meaning

> of this article [Article IV] is a law which applies to the whole State; a local law is a law which applies to any political subdivision or subdivisions of the State less than the whole;. . ."

From the foregoing constitutional provisions, it is clear that the requirement that notice required by Section 106 applies only to a local law that repeals or modifies a local law and does not apply to a general law that repeals a local law or a part of a local law. Assuming Act No. 248 to be a local law, the Board's contention is rejected. Act No. 819 does not violate Sections 106, 107 and 110 of the State Constitution in such regard.

The Personnel Board next argues that "a general law does not repeal or modify a local or special law although such was passed as a general law." This argument is supported by the Board's

citation and analysis of several cases best illustrated by Conner v State, 275 Ala. 230, 153 So. 2d 787 and Cooper v State, 28 Ala. App. 422, 187 So. 500, cert. denied 237 Ala. 533, 187 So. 503.

This principle argued by the Personnel Board in its full statement is that a general law will not repeal by implication a local law unless there is a manifestation of different intent to be found in the statute. Conner v State, supra.

The case of Shepherd v Clement, 244 Ala. 1, 141 So. 255, provides further guidance of the principle, stating,

> "We recognize the rule that the presumption in a general act does not repeal a local statute, but, as has been well said, 'such presumption must give way to a plain manifestation of a different legislative intent.' The question is one of intention which may be made to appear by the subject-matter with which the general act is concerned, by the surrounding circumstances, by other legislation on the same

> subject, and the purpose to be accomplished. Thus, where the clear general intent of the Legislature is to establish a uniform system throughout the state, the presumption must be that local acts are intended to be repealed." (Emphasis added)

It thus appears that the test is whether Act No. 819 shows a plain manifestation by the Legislature to repeal conflicting statutes relating to political activities of public employees subject to the Personnel Board Law.

The right of citizens of our country and state to engage in the full range of political activities is a constitutionally granted privilege unless it is limited for another constitutionally approved purpose in a lawful manner. Section 25 of the Personnel Board law dealt with one of these latter purposes and similar civil service type statutes have been approved by the Supreme Court of the United

States. Broadrick v State of Oklahoma, 413 U.S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1972) and others. The Court judically knows that, prior to the adoption of Act No. 819, there were other public employee civil service systems in the state applicable to state employees as well as other county and municipal employees and that it hardly needs noting that without a statutory abridgment of political rights, governmental employees enjoy the same political rights as other citizens. Being an employee of government in this State does not, of itself, isolate the employees from political activities.

In this setting, Act No. 819 was adopted. It states its application to all persons in the employment of any city of county or the state, whether

classified or not, and expressly repeals all laws or parts of laws in conflict.

The Court is, therefore, of the opinion that Act No. 819 shows the clear intent of the Legislature to establish a uniform policy throughout the State relating to the political activities of public employees, notwithstanding the existence of local or general laws to the contrary. The Personnel Board's argument to the contrary is rejected.

The Personnel Board next argues that, under the rule of law of this State, the Plaintiffs cannot accept the benefits of the Civil Service law and challenge its constitutionality. The Court does not disagree with the proposition as cited, but the Personnel Board's attempt to support its conten-

tions with this rule ignores the facts of this action. It is clear and undisputed that the Personnel Board announced by publication and dissemination of its Special Bulletin on June 30, 1978 that, on advice of counsel, the Board challenged the constitutionality of Act 819 and asserted therein that the Civil Service law was still in force. The rule cited by the Board has no application to this action.

The Personnel Board next responds to the Plaintiffs' averment in their complaint that there may arise an uncertainty as to the scope of the rights granted by Act No. 819 in respect to participation in campaigns for federal and political party office (Paragraph 11 of the complaint) by arguing that Act No. 819 is void as to certainty.

The issue presented by the Plaintiffs and responded to by the Board is raised by the averments of the complaint (Paragraph 8 that ". . . the Plaintiffs desire to participate (as a campaign worker, not as a candidate) in one or more political campaigns (at the federal, state, and political party level) in the primaries . ." Each of the named Plaintiffs has filed affidavits in support of their motion for summary judgment to the effect that Section 25 of the Civil Service law as amended by Act No. 819 prohibits public employees from participating in campaigns for the election of candidates for federal and political party offices, but does not similarly prohibit the Plaintiffs from participating in campaigns for county (or municipal as is applicable) and state offices. Each of the Plaintiffs asserts that they

have participated in campaigns for county (or municipal as is applicable) and state offices. Each of the Plaintiffs asserts that they have participated in campaigns for persons seeking election to party, state and federal offices and desire to continue doing so in the future. It appears that the Board's argument as to lack of certainty in Act No. 819 is interposed to these assertions of the Plaintiffs.

Although Act No. 819 does not attempt to enumerate each protected political activity therein, the caption and body of the Act express in clear terms the scope of the Act and the intent of the Legislature. The caption states,

> "To remove all restrictions relating to public employees . . . pertaining to his right to participate in certain political

> activities and allow employees the right of free expression in public welfare." (Emphasis added)

Excepting only the right of the public employee to participate in political activities of a governmental subdivision as that of his employer, the body of the Act expressly provides the right of public employees

> ". . . to participate in . . . political activities to the same extent as any other citizen of the State of Alabama . . ." (Emphasis added)

With this clear legislative directive and law, the Court is of the opinion that Act No. 819 grants to public employees of the counties and cities the right to engage in political campaigns for political party or federal offices.

Having concluded that Act No. 819 grants these rights, the reasoning and

opinion as to the repeal of contradictory restrictions in the Personnel Board law and rule is equally applicable in this regard. The Board's argument that Act No. 819 is void for lack of certainty is rejected. The Court is further of the opinion that Act No. 819 is not in violation of the First and Fourteenth Amendments to the United States Constitution or Section 5 of the Constitution of Alabama.

The Personnel Board lastly contends that Act No. 819 is invalidated by the federal Voting Rights Act of 1965. This contended invalidity is rested upon the contention that Act No. 819 has not been approved by the Attorney General of the United States. 42 USC 1973c. This Court is of the opinion that it does not have jurisdiction to adjudicate this issue and

that the question must be resolved in an appropriate federal action. The Voting Rights Act placed into law federal scrutiny and review of state and political subdivision ". . . voting qualifications or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964 . . ." No authority has been granted a state court of such review nor have the Defendants cited any such authority. This is a federal issue and must be adjudicated in a federal forum.

For such reason, the Defendants' contention in regard to the Voting Rights Act of 1965 is rejected.

Because of the length of this opinion and the complexity of the

issues, the Court's conclusions are summarized as follows:

1. Act No. 819 of the 1978 Regular Session is valid and constitutional enactment of the Legislature of Alabama insofar as its application to the parties to this action.

2. That the provisions of Section 25 of Act No. 248 of the 1945 Legislature that are inconsistent or contradictory with the rights granted by Act No. 819 are repealed.

3. That public employees subject to the provisions of said Act No. 248 are granted the right to engage in political campaigns for political party and federal officies.

ATTORNEYS FEES

In their prayer for relief, the Plaintiffs have prayed for an award of

attorneys fees. Their memorandums submitted as argument for this award argue that the attorneys fees be imposed upon the Defendants. These arguments rest upon various federal civil rights statutes. Section 14, Voting Rights Act; 42 USC 1988.

It is appropriate to note that the Plaintiffs did not bring this action pursuant to the authority of the federal Voting Rights Act. This issue was raised by the Defendants as a defense. The Court further notes that federal statutory violations were only claimed by the Plaintiffs in respect to the bulletin of the Board. This claim has been adjudicated herein as having not presented a justiciable controversy. For these reasons, the Court does not consider it necessary to rule upon the question of whether these statutes

grant attorneys fee authority to a Court of this State.

In Alabama and most other jurisdictions, the general rule is that attorneys fees or expenses of litigation are not recoverable from the opposing parties in the absence of a contractual or statutory duty, or other recognized equitable grounds. Highlands Underwriters Insurance Company v Elegante Inns, Inc., 361 So. 2d 1060; Cincinnati Insurance Company v City of Talledega, 342 So. 2d 331; Hartford Accident & Indemnity Co. v Cosby, 277 Ala. 596, 173 So. 2d 585.

There having been no contractual or statutory duty shown for the award of attorneys fees, the allowance of fees, if appropriate, must rest upon recognized equitable grounds.

In the case of Sims v Amos, 340 F. Supp. 691 (1972), affirmed 93 S. Ct.

290, 409 U.S. 942, 34 L. Ed. 2d 215, the Three-Judge District Court (M.D. Alabama, N.D.) considered and ruled upon the allowance of attorneys fees in connection with a class action that declared that the Alabama Legislature was malapportioned and ordered reapportionment based upon single member districts. In that opinion, the Court said,

> "As to plaintiff's motion for an allowance of attorneys' fees, the rule is well settled that such an award may be made in the exercise of the equity powers of the court. (Citations omitted) . . . Each case must be decided according to its own peculiar facts."

The Sims opinion recognizes that bad faith constituted by arbitrary, unreasonable, or obdurately obstinate behavior of opposing parties is a basis for the taxing or attorneys fees. The Sims court based its award on "far broader

considerations of equity." In this regard, the Court stated,

> "In instituting the case sub judice, plaintiffs have served in the capacity of 'private attorneys general' seeking to enforce the rights of the class they represent . . . (Citations omitted). If, pursuant, to this action, plaintiffs have benefited their class and have effectuated a strong congressional policy, they are entitled to attorneys' fees regardless of defendants' good or bad faith." (pg. 694)

The opinion and order of the Court in the case of Wyatt v Stickney, 344 F. Supp. 387 (1972) M.D. Alabama, N.D., also considered an award of attorneys fees against opposing parties. This was an aspect of a class action that resulted in finding that Partlow State School and Hospital was designed to rehabilitate the mentally retarted but was being operated in a constitutionally impermissible fashion. In Wyatt, the Court recognized that malfeasance shown

in that case constituted bad faith and that such bad faith formed a valid basis for the granting of attorneys' fees. The Court there, however, found that a more appropriate justification for attorneys fees evolved ". . . from a kind of benefit theory." citing Mills v Electro [sic] Auto-Lite Co., 396 U.S. 375, 90 S. Ct. 616, 24 L. Ed. 2d 593 (1970). The Court, in Wyatt, stated that,

> "Plaintiffs bringing suits to enforce a strong national policy often benefit a class of people far broader than those actually involved in the litigation. Such plaintiffs, who are said to act as 'private attorney general.' . . . Consequently, in order to eliminate the impediments to pro bono publico litigation and carry out congressional policy, an award of attorneys' fees not only is essential but also is legally required. (Citations omitted)."

The facts as shown in the present fact do not, in the Court's opinion,

measure up to a finding of bad faith. However, it is arguable that the Personnel Board was arbitrary, unreasonable and obdurately obstinate when it asserted the constitutionality of Act No. 819 and that employees in violation of the Civil Service law will be subject to disciplinary action, without itself, having sought a court declaration as to the validity of the Act. The Court, however, judicially knows that the Personnel Board is comprised by statute of three public spirited citizens who are willing to give of their time for the public good. In this instance, though, it appears that their action was the result of an overly protective attitude to maintain what they considered to be the integrity and cornerstone of the civil service system.

This action falls clearly within the benefit rule. By successfully prosecuting this action, the Plaintiffs have benefited not only the municipal and county employee class who are presently employed but also anyone who will be employed under the Personnel Board law in the future.

The Plaintiffs, in bringing this action, have successfully enforced a public policy of this State regarding the right of public employees to engage in certain political activities. It is not consequential that it is a public policy that is a legislative change from a former policy. The Personnel Board itself is a creature of the Legislature and only derives its authority by legislative enactment. The public policy of the State now is to permit public employees the same political rights, with

exceptions, as those of other citizens. The Plaintiffs' action here has been the instrument to accomplish this in Jefferson County. To burden only the Plaintiffs with the expense of litigation not only is unfair but, also, is legally impermissible. Wyatt v Stickney, supra.

Equitable principles require that those who profit should share the expense. In this case, the public will ultimately profit and the most reasonable way to spread the burden of expense among those benefited is to grant attorneys fees and tax them against the personnel Board. The result, therefore, would be that such expense would be paid from public funds that are appropriated and administered by the Board. In consideration of the findings herein, the Court sees no occasion that the

expense should be taxed to the Defendants in their individual capacities.

The Plaintiffs have not presented at this stage of the action evidence upon which the Court could make a determination and award of attorneys fees. For this reason, it is appropriate that the amount of the attorneys fees to be awarded be the subject of a further hearing. The Court's Judgment here will so provide.

The foregoing opinion resolves all of the issues presented in this action with the exception of consideration and award of the amount of attorneys fees due to be paid to the attorney for the Plaintiffs. Because of the imminence of the federal elections in the coming months, public and individual considerations dictate that the resolved issues be entered as a final judgment at

this time and that such not be delayed for award of attorneys fees.

Pursuant to the provisions of Rule 54(b), Alabama Rules of Civil Procedure, the Court finds that there is no just reason for delay in the entry of the matters adjudicated herein as a final judgment as to such matters. It is, therefore, ORDERED, ADJUDGED AND DECREED by the Court as follows:

1. The Court finds that all classified employees of Jefferson County and classified employees of the municipalities therein that are subject to the rules and regulations of the Personnel Board of Jefferson County are members of the class that are represented by the named Plaintiffs.

2. That Act No. 819 of the 1978 Regular Session of the Legislature of Alabama is a valid and constitutional

enactment of such body insofar as its pronouncements and application to the parties to this action and the class of persons represented by the named Plaintiffs.

3. That the provisions of Section 25 of Act No. 248 of the 1945 Legislature of Alabama, as amended, that are inconsistent or contradictory with the rights granted by the provisions of said Act No. 819 are repealed.

4. That the provisions of Rule 10 of the said Personnel Board that are inconsistent or contradictory with the rights granted by the provisions of said Act No. 819 are declared invalid and void.

5. That the provisions of said Act No. 819 grant to the named Plaintiffs and the class represented by them the right to engage in political campaigns

for political party and federal offices.

6. The Defendants, their successors, and their employees, are permanently enjoined from attempting to enforce, enforcing, or threatening to enforce Section 25 of said Act No. 248 or Rule 10 of the Rules and Regulations of the Personnel Board of Jefferson County insofar as the provisions of said Act No. 819 or the declarations adjudged herein.

7. The principals and sureties on the bond filed by the Plaintiffs to secure the preliminary injunction previously entered in this action are released and discharged.

8. The costs incurred to this point of this controversy are taxed to the Personnel Board of Jefferson County.

9. The Court retains jurisdiction of this action for the purpose of

consideration and award of attorneys fees to the attorney for the Plaintiffs. This matter will be the subject of further hearing after notice by the Court to the attorneys of the respective parties.

DONE and ORDERED this 20th day of February 1980.

/s/ William A. Thompson
Circuit Judge

CIRCUIT COURT, TENTH JUDICIAL CIRCUIT
OF ALABAMA

EQUITY DIVISION

CASE NO. CV 78 503-740 WAT

ELIZABETH R. STILL and BILLY GRAY, for themselves and all others similarly situated,

Plaintiffs

VS.

PERSONNEL BOARD OF JEFFERSON COUNTY; JOSEPH W. CURTIN, individually and as Director of the Personnel Board; HENRY JOHNSTON, JAMES JOHNSON, and HIRAM McKINNEY; individually and as members of the Personnel Board.

Defendants

[filed 17 June 1980]

ORDER AND AMENDMENT TO FINAL JUDGMENT

This action came to be heard by the Court on motion of the Plaintiffs for award of attorneys fees filed pursuant to the Final Judgment heretofore entered in this action and on motion of the

Defendants to alter, amend or vacate Final Judgment.

The Defendants' motion urges the Court to alter, amend or vacate the Final Judgment upon the grounds that it is erroneous as a matter of law, as a matter of fact, and specifically with respect to the Court's ruling that the Plaintiffs are entitled to an award of attorneys fees from the Defendant, Personnel Board of Jefferson County.

The reasons for such award are set forth in full in the opinion portion of this Court's Final Judgment and was based, in large part, on the opinion and ruling in Sims v Amos, 340 F. Supp. 691 (1972), affirmed 93 S. Ct. 290, 409 U.S. 942, 34 L. Ed. 2d 515. In doing so, this Court also considered the opinion and holding in the case of Alyeska Pipeline Service Company

v Wilderness Society, 421 U.S. 240, 44 L. Ed. 2d 141 (1975). In attempting to reconcile Sims (affirming the award of attorneys fees against the defendant on the "benefit theory") and Alyeska (denying attorneys fees on the "private attorney general theory,") this Court distinguished the apparent contradictory rulings on the circumstances that Sims enforced a public right against state government and Alyeska enforced public rights against a privately owned corporation. The "benefit theory," appeared to this Court, to be appropriate when the wrongdoer was found to be the government and the rights enforced were for the benefit of the public. This distinction squared in the Court's mind and analysis the contradiction of the two cases.

The Supreme Court of this State, however, has rejected an exception to the "American Rule" in denying the award of attorneys fees on the "private attorney general/benefit theory" even when a subdivision of the government was found to be the wrongdoer. This ruling was set forth in Shelby County Commission v Smith, 372 So.2d 1092 (July 6, 1979), but was overlooked previously by this Court and not cited initially by either party here. In Shelby County Commission v Smith, the Supreme Court of Alabama gave accord and adopted the attorneys fee rule set forth in Alyeska.

This Court perceives a logical distinction between Alyeska and this action, as stated above but is compelled to follow the clear ruling of the Supreme Court of Alabama.

For such reasons, the aspect of

this Court's Final Judgment holding that the Plaintiffs are entitled to an award of attorneys fees from the Defendant, Personnel Board, and retaining jurisdiction for such purpose is due to be vacated and the Final Judgment amended to reflect such effect. For the same reasons, the motion of the Plaintiffs for award of attorneys fees is due to be denied.

It is, therefore, ORDERED, ADJUDGED AND DECREED by the Court as follows:

1. The motion of the Plaintiffs for award of attorneys fees is hereby denied.

2. The opinion and paragraph 9 of the decretal portion of the Final Judgment entered by this Court on February 20, 1980, relating to the award of attorneys fees to the Plaintiffs are

hereby vacated and the said paragraph 9 is amended to provide as follows:

"9. The prayer for relief of the Plaintiffs for an award of attorneys fees to be paid by the Defendants is denied."

DONE and ORDERED this 16th day of June 1980.

/s/ William A. Thompson
Circuit Judge

THE STATE OF ALABAMA - - - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

SPECIAL TERM, 1981

79-824

Elizabeth R. Still, et al.

v.

Personnel Board of Jefferson County, et al.

Appeal from Jefferson Circuit Court

This cause having been duly argued and submitted, IT IS CONSIDERED ORDERED AND ADJUDGED that the judgment of the circuit court be affirmed.

IT IS FURTHER ORDERED AND ADJUDGED that the appellant, Elizabeth R. Still,

and Wilson Edward Still, Jr., surety for the costs of appeal, pay the costs of appeal as provided by the Alabama Rules of Appellate Procedure. And it appearing that said parties have waived their rights of exemption under the laws of Alabama, IT IS ORDERED that execution issue accordingly.

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY
OCTOBER 30, 1981

Re: 79-824

Elizabeth R. Still
Appellant

vs.

Personnel Board of Jefferson
County, et al
Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

* * *

Application for rehearing overruled. No opinion written on rehearing.

* * *

/s/J. O. Sentell

Clerk, Supreme Court of Alabama

IN THE SUPREME COURT OF ALABAMA
No 79-824

ELIZABETH R. STILL, et al., for themselves and all others similarly situated,

Appellants

v.

PERSONNEL BOARD OF JEFFERSON COUNTY, et al.,

Appellees.

APPELLANTS' MOTION FOR RECONSIDERATION AND BRIEF

The Plaintiff-appellants move for reconsideration on the following grounds:

1. The Court has incorrectly decided that a state court is not obliged to grant fees when the plaintiff prevails on a state, but not a federal claim.

2. The Court has not decided the issues presented by the appellants, to wit:

(a) Do two laws which, on their face, allow employees to participate in election campaigns for certain state and local offices but prohibit all other campaigning (including campaigns for federal or political party offices) violate public employees' rights to freedom of speech and association?

(b) May an Alabama court grant attorneys' fees under the equitable doctrine of common benefit, even when the action did not create or preserve a fund, but the parties are so situated that the cost of the litigation can be spread among its beneficiaries by assessing attorneys fees against the defendant?

[date of service: 25 September 1981]

Opposition

Office - Supreme Court, U.S.
FILED
MAR 3 1982
ALEXANDER L. STEVAS,
CLERK

NO. 81-1420

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1981

ELIZABETH R. STILL, for herself and all others similarly situated,

Petitioner

vs.

PERSONNEL BOARD OF JEFFERSON COUNTY; JOSEPH W. CURTIN, individually and as Director of the Personnel Board; HENRY JOHNSTON, JAMES JOHNSON and HIRAM McKINNEY, individually and as members of the Personnel Board,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

James B. Kierce, Jr.
James R. Clifton
STONE, PATTON & KIERCE
118 North 18th Street
Bessemer, Alabama 35020
205/424-1150

Attorneys for Respondents

QUESTION PRESENTED

Will the joinder of constitutional and federal statutory claims to what is basically a state declaratory judgment action justify the award of attorney's fees under the Civil Rights Attorney's Fees Award Act of 1976?

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Shelby County Commission v. Smith, 372 So.2d 1092 (Ala. 1979) 6

Still v. Personnel Board, 406 So.2d 860 (Ala. 1981) 6, 7

Ward Lumber Co. v. Brooks, 273 SE 2d 331 (N.C. App. 1981) 4, 5

Statutes:

Act 819, 1978 Regular Session, Alabama Legislature, codified as 1975 Code of Alabama, § 17-1-7 2

Alabama Declaratory Judgment Act, 1975 Code of Alabama, § 6-6-220 *et seq* ..... iii, 5

Civil Rights Attorneys Fees Award Act of 1976 ..... i, 1, 3, 8

REPORT OF CASE

The decision of the Alabama Supreme Court is reported at 406 So.2d, 860 (Ala. 1981).

STATUTES INVOLVED

Besides the statutes cited by petitioner, respondent cites the Alabama version of the Uniform Declaratory Judgment Act, 1975 *Code of Alabama*, § 6-6-220 *et seq.*, which states in pertinent part at § 6-6-221:

> "This article is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations and is to be liberally construed and administered. . . ."

It should be noted that Act 819, cited by petitioner, is now codified in 1975 *Code of Alabama*, § 17-1-7.

STATEMENT OF FACTS

Respondent agrees basically with petitioner's statement of the facts.

NO. 81-1420

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1981

ELIZABETH R. STILL, for herself and all others similarly situated,

Petitioner

vs.

PERSONNEL BOARD OF JEFFERSON COUNTY; JOSEPH W. CURTIN, individually and as Director of the Personnel Board; HENRY JOHNSTON, JAMES JOHNSON and HIRAM McKINNEY, individually and as members of the Personnel Board,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

The Civil Rights Attorney's Fees Award Act of 1976, 42 USC 1988, (hereinafter called the Act) does not apply to cases where alleged civil rights violations are added to what is in fact a declaratory judgment case brought under state law. The ruling of the Alabama Supreme Court below is in accord with decisions construing the Act and no impor-

tant question of federal law is raised which justifies the grant of a writ of certiorari here.

ARGUMENT

A clever drafter can turn practically any case into a civil rights action, for in almost every lawsuit "rights" are allegedly violated. While alleging constitutional and federal statutory grounds for relief, this action was and always has been a declaratory judgment case seeking a determination concerning the status of the parties respecting a recent change in Alabama state law.[1]

Contrary to the statement set out in petitioner's Questions Presented, the trial court and Alabama Supreme Court did not grant all relief requested by petitioner. The constitutionality of Act 819 was upheld and petitioner's constitutional and federal statutory claims were specifically denied.[2]

THE PURPOSE OF THE ACT. The Act was never intended to apply to cases such as the one at bar. Senate Report Number 94-1011 sets out the purpose of the Act:

> "This amendment to the Civil Rights Act of 1866, Revised Statutes Section 722, gives the Federal courts discretion to award attorneys' fees to prevailing parties in suits brought to enforce the civil rights acts which Congress has passed since 1866. The purpose of this amendment is to remedy anomalous gaps in our civil rights laws created by the United States Supreme Court's recent decision in *Alyeska Pipeline Service Co.*

[1]That the complaint was one for declaratory judgment was noted early in the final judgment of the trial court:

> "The action seeks a declaratory judgment in respect to the scope of Act 819 of the 1978 Regular Session of the Legislature relating to the rights of all city, county and state employees to participate in certain political activities." (A-6).

[2]Final Judgment, A-19 and 20; *Still v. Personnel Board of Jefferson County*, 406 So.2d 860, 862 (Ala. 1981), A-32.

v. Wilderness Society, 421 U.S. 240 (1975) and to achieve consistency in our civil rights laws.[3]

* * * * * * *

"This bill, S.2278, is an appropriate response to the *Alyeska* decision. It is limited to cases arising under our civil rights laws, a category of cases in which attorneys fees have been traditionally regarded as appropriate. It remedies gaps in the language of these civil rights laws by providing the specific authorization required by the Court in *Alyeska*, and makes our civil rights laws consistent."[4]

* * * * * * *

"This bill creates no startling new remedy — it only meets the technical requirements that the Supreme Court has laid down if the Federal courts are to continue the practice of awarding attorneys' fees which had been going on for years prior to the Court's May decision."[5]

Likewise, House Report Number 94-1558 stated:

"H.R. 15460, the Civil Rights Attorney's Fees Awards Act of 1976, would amend Section 722 (42 U.S.C., 1988) of the Revised Statutes to allow the award of fees in certain civil rights cases. It would apply to actions brought under seven specific sections of the United States Code. Those provisions are: Section 1981, 1982, 1983, 1985, 1986, and 2000d et seq. of Title 42; and Section 1681 et seq. of Title 20. See Appendix B for full texts. The affected sections of Title 42 generally prohibit denial of civil and constitutional rights in a variety of areas, while the referenced sections of Title 20 deal with discrimination on account of sex, blindness, or visual impairment in certain education programs and activities."[6]

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[3]S. Rep. No. 94-1011, 94th Congress, 2d Sess. 1 (1976).
[4]Id., 4.
[5]Id., 6.
[6]H.R. Rep. No. 94-1558, 94th Congress, 2d Sess. 4 (1976).

The clear intent of Congress was to insure that lawyers, bringing cases in the public interest dealing with environmental, consumer, or civil rights issues would be entitled to attorney's fees as was the practice in most federal courts prior to this Court's *Alyeska* decision.[7] The Act has no effect on a purely state law claim as here.

JOINDER OF "FEE CLAIM" WITH "NON-FEE CLAIM". The House Report addressed the question of the joinder of a "fee claim" with a "non-fee claim", precisely the question presented here:

> "To the extent a plaintiff joins a claim under one of the statutes enumerated in H.R. 15460 with a claim that does not allow attorney fees, that plaintiff, if it prevails on the non-fee claim, is entitled to a determination on the other claim for the purpose of awarding counsel fees. *Morales v. Haines,* 486 F.2d 880 (7th Cir. 1973). In some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constitutional claim is dispositive. *Hagans v. Lavine,* 415 U.S. 528 (1974). In such cases, if the claim for which fees may be awarded meets the 'substantiality' test, *see Hagans v. Lavine, supra; United Mine Workers v. Gibbs,* 383 U.S. 715 (1966), attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a 'common nucleus of operative fact.' *United Mine Workers v. Gibbs, supra,* at 725."[8]

Therefore, the test to determine whether a prevailing plaintiff is entitled to attorney's fees is two-pronged:

(1) Was there a substantial "fee claim", and

(2) Was there a common nucleus of operative facts?

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[7] *Alyeska Pipeline Co. v. Wilderness Society,* 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed. 2d 141 (1975).

[8] H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 4, n.7 (1976).

In a case remarkably similar to the one at bar, the North Carolina Court of Appeals denied a request for attorney's fees.[9] Plaintiff Lumber Company had successfully obtained a declaratory judgment holding that a North Carolina statute was unconstitutional to the extent that it purported to authorize warrantless inspections.

The North Carolina Court set out the tests above and found the Act inapplicable to the relief obtained by the plaintiff pursuant to North Carolina's declaratory judgment act.

> "Simply stated, plaintiff has failed to show any deprivation of rights as required in order to claim relief under 42 U.S.C. § 1983."[10]

Likewise, the Alabama Supreme Court found the Act inapplicable to the relief obtained by the plaintiff under the Alabama declaratory judgment act. For just as in the North Carolina case, no evidence was presented in the case at bar to show a deprivation of any constitutional rights as a result of any action by the respondents.[11]

PETITIONER'S AUTHORITY DISTINGUISHED. The Alabama Court in the decision below, adequately and accurately distinguished the *Maine*[12] and *Maher*[13] cases relied on by petitioner as authority for this Court to grant certiorari.

Petitioner can find no relief in the *Seals*[14] and *Draper*[15] cases. In both cases, the Courts found the plaintiffs had

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[9]*Ward Lumber Co. v. Brooks*, 50 N.C. App. 294, 273 S.E. 2d 331 (N.C. App. 1981), *cert. den.* ..... U.S. ....., 102 S.Ct. 670, ... L.Ed. ..... (1981).

[10]Id. at 273 S.E. 2d 333.

[11]Indeed the granting of a preliminary injunction allowed petitioner to participate in elections as requested throughout the course of this lawsuit. Final Judgment, A-7.

[12]*Maine v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed. 2d 555 (1980).

[13]*Maher v. Gagne*, 448 U.S. 1221, 100 S.Ct. 2570, 65 L.Ed. 2d 653 (1980).

[14]*Seals v. Quarterly County Court*, 562 F.2d 390 (6th Cir. 1977).

[15]*Draper v. Town Clerk of Greenfield*, 425 N.E. 2d 333 (Mass. 1981).

met both tests set out above and were, therefore, entitled to attorney's fees. Both the trial court and the Alabama Supreme Court found there was no substantial constitutional or federal claim present in petitioner's suit.[16]

In sum, the cases cited by petitioner stand for the proposition that a prevailing plaintiff is entitled to an award of attorney's fees if he proves a state violation of a federally protected right or entitlement, whether that right or entitlement be statutory or constitutional. Petitioner's case seeking a declaratory judgment has not reached this level of proof.

THE LOWER COURT'S DECISION. The American rule, as discussed in *Alyeska*, while perhaps seriously wounded, is not dead. The rule is still valid when applied to cases not within the perview of the Act. The Alabama courts follow the American rule.[17]

In the decision below, the Alabama Supreme Court stated:

> "It is our opinion that a state court is not required to award attorneys' fees to a party that prevails on state grounds only, regardless of what other federal claim is attached thereto. *Shelby County Commission v. Smith*, 372 So.2d 1092 (Ala. 1979).
>
> "The trial court's decision is not based on constitutional grounds but merely on the language of § 17-1-7. As such, there is no federal statutory or constitutional grounds to allow the award of attorneys' fees.

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[16]It is noted that the voting rights issue in the case at bar was raised by respondent and is nowhere mentioned in the complaint or amendment thereto. The voting rights act was first embraced by petitioner to support the request for attorney's fees. Final Judgment, A-19; 20. Amended Complaint, A-1 thru 5.

[17]*Shelby County Commission v. Smith*, 372 So.2d 1092 (Ala. 1979).

> "Therefore, the judgment denying Plaintiffs' attorneys' fees is affirmed."[18]

Neither the Alabama Supreme Court nor the trial court was predisposed to avoid the federal or constitutional issues allegedly raised by petitioner. Both found no substantial federal or constitutional claim upon which to base attorney's fees. What the Court is saying then, is that this case is nothing but a declaratory judgment suit and attaching superfluous federal claims to such a suit will not justify the award of attorney's fees.

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[18] *Still*, 406 So.2d at 862; A-32.

CONCLUSION

In seeking this Court's review, petitioner is asking for an unwarranted and unjustified extension of the Civil Rights Attorney's Fees Award Act of 1976 and an unbelievable extension of this Court's ruling in *Maine* and *Maher*. In passing the Civil Rights Attorney's Fees Award Act of 1976, Congress wanted to bridge the gap in the awarding of attorney's fees in civil rights actions. The bridge built by Congress does not come close to reaching the claims in petitioner's lawsuit.

It is respectfully submitted that the petitioner has fully failed to sustain his burden under Rule 17 showing special and important reasons why the writ should be granted. The decision below did not address important questions of federal law, but simply applied the law as passed by Congress and interpreted by this Court.

PREMISES CONSIDERED, petitioner's writ is due to be denied.

Respectfully submitted,

STONE, PATTON & KIERCE

By _____
James B. Kierce, Jr.

By _____
James R. Clifton

Appendix

IN THE CIRCUIT COURT OF JEFFERSON COUNTY

ELIZABETH R. STILL, for herself and all others similarly situated,	)	
PLAINTIFF,	)	
vs.	)	CV 78 503-740-WAT
PERSONNEL BOARD OF JEFFERSON COUNTY; JOSEPH W. CURTIN, individually and as Director of the Personnel Board; HENRY JOHNSTON, JAMES JOHNSON, and HIRAM McKINNEY; individually and as members of the Personnel Board.	)	
DEFENDANTS.	)	

AMENDED COMPLAINT AND MOTION FOR TEMPORARY RESTRAINING ORDER

1. This action arises under the First and Fourteenth Amendments to the Constitution of the United States, 42 USC §1983, Section 5 of the Constitution of Alabama, and §6-6-220 *et seq*. This action seeks an injunction against the actions of the Jefferson County Personnel Board in attempting to restrict the right of public employees to participate in political campaigns to the extent allowed by Act 819, 1978 Regular Session. This action also seeks a declaratory

judgment regarding the scope of the restrictions contained in Act 819 as they apply to federal or party office campaigns.

2. The plaintiff Elizabeth R. Still is a resident of the Birmingham Division of Jefferson County and is employed by Jefferson County as a senior probation officer for the Family Court. The Plaintiff Billy Gray is a resident of Jefferson County and is employed as a fire fighter by the City of Birmingham. Each is subject to the rules and regulations of the defendants.

3. Plaintiffs [*sic*] brings this action on behalf of herself and all members of a class composed of the classified employees of Jefferson County, or its municipalities under the jurisdiction and control of the Jefferson County Personnel Board. The class is so numerous that joinder of all members is impracticable; the total membership of the class is at least one thousand (1000). There are questions of law common to the class, such as the right of class members to participate in political campaigns to the extent allowed by Act 819 despite the threats of the Personnel Board to discipline such protected activity. Plaintiffs' claim is typical of the claims of the class. Plaintiffs will fairly and adequately protect the interests of the class. This action ought to be allowed to proceed as a class action because one action will as a practical matter be dispositive of the interests of the persons not parties.

4. The defendants are the Personnel Board of Jefferson County, its director, and its members. The individual defendants are residents of Jefferson County.

5. During the 1978 Regular Session, the State Legislature passed Act 819 (SB 608), a copy of which is attached as Exhibit A.

6. Prior to the passage of Act 819, the Jefferson County Personnel Board operated under the authority of a 1945

Act. Section 25 of this act prohibited a broad range of political activities. See *Ala. Code,* Appx. §669 (as amended) (1958 Recomp). The Personnel Board has adopted a rule restating these restrictions. Said Rule is attached hereto as Exhibit B.

7. On 30 June 1978, the Personnel Board published a Special Bulletin (attached hereto as Exhibit C) informing employees that they would be subject to disciplinary action in accordance with Rule 10 and Section 25 of the Civil Service Law if they participated in any political activities forbidden by Rule 10 or Section 25.

8. The plaintiffs desire to participate (as a campaign worker, not as a candidate) in one or more political campaigns (at the federal, state, and political party level) in the primaries to be held on 5 and 26 September 1978 and the General Election in November 1978.

FIRST CAUSE OF ACTION

9. The Special Bulletin of 30 June violates the rights of plaintiffs and the class they represent in that it attempts to restrict the political activities of public employees beyond the compelling need of the State, in violation of the First and Fourteenth Amendments to the Constitution of the United States, Section 5 of the Constitution of Alabama, and 42 USC §1983.

SECOND CAUSE OF ACTION

10. The Special Bulletin of 30 June, Rule 10, and Section 25 of the Civil Service Law violate the provisions of Act 819 by restricting the political activities of public employees beyond the restrictions allowed by Act 819.

THIRD CAUSE OF ACTION

11. The literal terms of Act 819, read in conjunction with the Civil Service Law applicable to Jefferson County,

will allow the defendants to prohibit civil service employees from participating in campaigns for the election of candidate to federal and political party offices. Such a restriction denies plaintiffs and their class equal protection of laws in violation of the Fourteenth Amendment to the United States Constitution and deprives them of the freedom of speech and association in violation of the First and Fourteenth Amendments to the United States Constitution and Section 5 of the Constitution of Alabama. (The Attorney General of Alabama shall be served with a copy of this amended complaint in order that he may defend the constitutionality of these State laws).

NEED FOR INJUNCTIVE RELIEF

12. The plaintiffs [*sic*] has no adequate remedy at law and will suffer irreparable harm unless a temporary restraining order is issued to prohibit the defendants from enforcing or threatening to enforce the provisions of Rule 10 or Section 25 of the Civil Service Law in contravention of Act 819. Immediate action is necessary because political campaigns have started and each day of delay constitutes a day on which plaintiffs' right to participate, as guaranteed by the First Amendment to the Constitution of the United States and Section 4 of the Constitution of Alabama, is violated.

WHEREFORE, the plaintiffs pray that the Court grant the following relief:

A. Certify the plaintiffs as representative of the class of classified employees under the jurisdiction of the Jefferson County Personnel Board.

B. Grant a temporary restraining order to prohibit the defendants from enforcing or threatening to enforce Rule 10 of its rules or Section 25 of the Civil Service Law, *Ala. Code,* Appx. §669 (1958 Recomp), against any classified

city employee participating as a worker in any political party, county, state, or federal campaign, or against any classified county employee participating as a worker in any political party, city, state, or federal campaign.

C. Grant a preliminary injunction, after hearing, in the same terms as the temporary restraining order prayed for above.

D. Grant a permanent injunction in the same terms as the preliminary injunction prayed for above.

E. Issue a declaratory judgment that Act 819 allows city, county, and state employees to work in campaigns for federal offices.

F. Issue a declaratory judgment that Act 819 allows city and county employees to run for political party offices and to work in the campaigns of others seeking political party offices.

G. Grant the plaintiffs their costs and a reasonable attorneys' fee.

Submitted by,

/s/ Edward Still

Edward Still
James H. Davis
601 Title Building
Birmingham, AL 35203
205/322-1694

CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that, prior to or immediately after filing the foregoing with the Court, I mailed or delivered a copy to:

William G. Stone, STONE, PATTON, & KIERCE, 118 18th Street North, Bessemer, Alabama 35020.

DATE: 20 July 1978 /s/ Edward Still

ELIZABETH R. STILL and BILLY GRAY, for themselves and all others similarly situated	*	CIRCUIT COURT, TENTH JUDICIAL CIRCUIT OF ALABAMA
Plaintiffs	*	
	*	
VS.	*	EQUITY DIVISION
	*	
PERSONNEL BOARD OF JEFFERSON COUNTY; JOSEPH W. CURTIN, individually and as Director of the Personnel Board; and HIRAM McKINNEY, individually and as members of the Personnel Board	*	CASE NO. CV 78 503-740 WAT
Defendants	*	

FINAL JUDGMENT

This is an action by the Plaintiffs, Elizabeth R. Still and Billy Gray, individually and as class action representatives, against the Personnel Board of Jefferson County, its director and board members, seeking preliminary and permanent injunctive relief against the enforcement of a bulletin and rule of the Board and the statutory origin of the rule prohibiting certain political activity by classified employees of Jefferson County and certain municipalities within the County. The action seeks a declaratory judgment in respect to the scope of Act No. 819 of the 1978 Regular Session of the Legislature relating to the rights of all City, County and State employees to participate in certain political activities.

The Plaintiffs, Still and Gray, were certified by the Court as representatives of the class of classified employees of Jefferson County and the municipalities, respectively, subject to the jurisdiction of the Personnel Board. Still is em-

ployed by Jefferson County as a senior probation officer for the Family Court and Gray is employed by the City of Birmingham as a firefighter.

The action was certified as an appropriate class action pursuant to the provisions of Rule 23(b) (2) of the Alabama Rules of Civil Procedure and this judgment shall be applicable to all classified employees, county and municipal, who are subject to jurisdiction of the Personnel Board of Jefferson County.

During prior proceedings, the Court entered a preliminary injunction against the Defendants enjoining them from enforcing Rule 10 of the Board or Section 25 of the Civil Service law applicable to Jefferson County in respect to classified City employees participating as workers in campaigns for political party offices and County, State or Federal elections and classified County employees participating as workers in political party offices or City, State or Federal elections.

The Plaintiffs have moved for summary judgment upon the issues that Section 25 of the Civil Service law has been amended by Act No. 819, 1978; that the Personnel Board has attempted to restrict the activities of public employees beyond the compelling need of the State; and that said Section 25 as amended by Act No. 819 prohibits public employees from participating in campaigns for election of candidates to federal and political party offices in violation of the State and Federal Constitutions.

The Defendants have moved for judgment on the pleadings.

Upon consideration of the matters presented, the Court is of the opinion that there is presented no genuine issue as to any material fact and that an adjudication of this action rests solely upon questions of law. Rule 56, Alabama Rules of Civil Procedure.

SPECIAL BULLETIN OF PERSONNEL BOARD
(Plaintiffs' First Cause of Action)

On June 30, 1978 the Personnel Board issued to its affected agencies a special bulletin directed to all classified employees regarding political activities (Exhibit C to complaint). This document stated that on advice of counsel the Board challenges the constitutionality of Act No. 608 and asserts that the Civil Service law and rules relating to political activity is in force. The bulletin also states that employees in violation thereof will be subject to disciplinary action. The bulletin is apparently referring to Act No. 819 [Senate Bill 608].

The Plaintiffs aver that the bulletin violates employee rights citing First and Fourteenth Amendments to the Federal Constitution, Section Five of the State Constitution and 42 USC 1983.

It is apparent that the bulletin does nothing more than state the position of the Board in regard to the contended validity of Act No. 819 and the continued effectiveness of the Civil Service statute and the Board's rules as they apply to political activity. According to the positions and contentions of the parties, the bulletin itself does not present a justiciable controversy. The issue actually in dispute is the scope of the Board's authority to continue to regulate and prohibit certain political activity. This issue is raised by the Plaintiffs' Second and Third cause of action.

VALIDITY OF ACT NO. 819

Act No. 819 of the 1978 Regular Session of the Legislature approved May 4, 1978 provides as follows:

> "To remove all restrictions relating to Public Employees of any County or City in the State of Alabama, pertaining to his right to participate in certain political activities and allow public employees the right of free expression in public welfare.

Be It Enacted by the Legislature of Alabama:

Section 1. (A) No person in the employment of any city, whether classified or unclassified, shall be denied the right to participate in county and state political activities to the same extent as any other citizen of the State of Alabama, including endorsing candidates and contributing to campaigns of his choosing.

(B) No person in the employment of any county, whether classified or unclassified, shall be denied the right to participate in city and state political activities to the same extent as any other citizen of the State of Alabama, including endorsing candidates and contributing to campaigns of his choosing.

(C) No person in the employment of the State of Alabama, whether classified or unclassified, shall be denied the right to participate in city or county political activities to the same extent as any other citizen of the State of Alabama, including endorsing candidates and contributing to campaigns of his choosing.

(D) All persons in the employment of any city or county shall have the right to join local political clubs and organizations, and state or national political parties.

(E) All persons in the employment of any city or county shall have the right to publicly support issues of public welfare, circulate petitions calling for or in support of referendums, and contribute freely to those of his choosing.

Section 2. No person shall attempt to use his official authority or position for the purpose of influencing the vote or political action of any person. Any person who violates this section of this act shall be guilty of a felony punishable by a fine not to exceed $10,000.00 or imprisonment in the State penitentiary for a period not to exceed two (2) years, or both.

Section 3. All laws or parts of laws in conflict with this Act are hereby repealed.

Section 4. This Act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law."

Essentially, the Act, in apparent recognition of regulated political activity of public employees, affirmatively provides

that city, county and state employees shall not be denied the right to participate in political activities as are other citizens, except that the right is not extended to permit the employee to engage in political activities in the same subdivision of government as his employer. City employees are not granted the right to engage in municipal political activities. The political activities of county and state employees are similarly expressed. The Act further specifically grants to city and county employees the right to join local political clubs and organizations at all levels of the political strata and the right to publicly support issues of public welfare, petition for and against referendums and make political contributions. The Act further sets forth a repealer clause as to all laws or parts of laws in conflict with the Act.

The answer of the Personnel Board and its members denies the application of the First and Fourteenth Amendments of the Federal Constitution, denies that property or vested rights are involved and denies that a justiciable controversy exists so as to authorize the Plaintiffs to seek declaratory relief. The Defendants further deny that the Board and the Defendants individually are subject to suit. These denials are made by the Defendants to the Plaintiffs' general averments. The Court notes that the Defendants do not deny that the Board members and director are suable in their respresentative capacities. The fact that they are proper parties and have been so named makes their individual defense merely a smoke screen and apparently an attempted diversion. This latter denial merits no further consideration.

The gist of the Board's defenses and claims is that Act No. 819 is unconstitutional and void because it violates Section 45 of the Constitution of the State, that it was not published as required by Section 106 of the State Constitution and that it is vague and uncertain. The Defendants further contend that the Voting Rights Act of 1965 [42 USC 1973(c)] invalidates Act No. 819 and that the Act is in con-

flict with Federal Statute 5 USC 1502. Lastly, the Defendants contend that the Plaintiffs cannot accept the benefits of the Civil Service law and then challenge its constitutionality.

The scattergun defenses of the Board appear to the Court as an attempt to obscure the central issue as to whether Act No. 819 supercedes and repeals by inference certain employee political activities placed into the law by prohibitions set forth in Section 25 of Act No. 248 of the 1945 Legislature.

Suffice it to recognize that the Personnel Board Act (Act No. 248), as amended, created a merit or civil service system in counties of the state having a population of 400,000 or more inhabitants for the government and control of all employees of such counties and of the municipalities within such counties having a population of 5,000 or more. The Act is also applicable to certain boards and agencies within the counties involved. [Appendix, Section 645, et seq., Code 1958 (Recompiled)]. The Jefferson County Personnel Board was created and operates pursuant to the authority of Act No. 248.

Section 25 of Act No. 248 sets forth a broad range of prohibitions and protections applicable to employees and officials involving political activities. In substance, these prohibitions are intended to remove the affected employees and their influence from the political arena and to protect them from the spoils system prevalent in some areas of the country in past years. This section provides in part that:

> "No employee . . . shall, directly or indirectly, pay or promise to pay any assessments, subscription or contribution for any political organization or purpose, or solicit or take any part in soliciting any such assessment, subscription, or contribution, ... No employee shall be a member of any national, state or local committee of a political party, or an officer of a partisan political club, or a candidate for nomination or election to any public office, or shall take any part in the management or affairs of any political party or in any political cam-

> paign, except to exercise his right as a citizen privately to express his opinion and cast his vote. Any officer or employee under the jurisdiction of this act who violates any of the foregoing provisions of this section shall forfeit his office or position."

Rule 10 of the Personnel Board, promulgated by the Board pursuant to its rule making authority, established as a rule the protections and prohibitions placed into law by Section 25 of Act No. 248.

Are the provisions of Act No. 819 and the conduct proscribed in the Act in conflict with the Personnel Board law (Section 25, Act No. 248)?

The obvious answer is yes. In a broad sense, Act No. 819 grants to public employees the right to participate in political activities to the same extent as other citizens, including endorsing candidates, contributing to campaigns, joining political clubs, organizations, parties, publicly supporting public issues and circulating petitions.

The Personnel Board law prohibits employees from soliciting or paying political contributions or assessments, being a member of a committee of a political party, being an officer of a partisan political club, being a candidate for nomination or election to any political office and taking part in the management affairs of any political party or campaign.

Having concluded that Act No. 819 is at variance or in conflict with Act No. 248, the next issue to be resolved is whether Act No. 819 is valid generally and whether it is valid when considered in the light of the prior existence of Act No. 248. If Act No. 819 is found to be valid, it, upon passage, became the controlling statute applicable to political activity of employees subject to the Jefferson County Personnel System.

The Personnel Board contends that Act No. 819 violates Section 45 of the State Constitution in that the Act contains a subject not clearly expressed in the title of the Act; i. e.,

that the title does not refer to state employees though one section of the Act clearly does.

Neither Plaintiff Still or Plaintiff Gray is a state employee nor does the Board purport to regulate state employees. It might be concluded in an appropriate proceedings that the Act is void as to state employees, but that issue is not in controversy here and not appropriate for adjudication now.

Even if the provisions of the Act relating to state employees are invalid, the Court is of the opinion that the remaining provisions of the Act regarding city and county employees can stand the test of severability.

The Act should not be held to be wholly void ". . . unless the invalid portion is so important to the general plan and operation of the law in its entirety as reasonably to lead to the conclusion that it would not have been adopted if the Legislature had perceived the invalidity of the part so held to be unconstitutional." *A. Bertolla & Son v. State*, 247 Ala. 263, 24 So. 2d 23. In the case of *City of Mobile v. Gaylord Dept. Stores of Alabama, Inc.*, 276 Ala. 568, 165 So. 118, the Supreme Court of Alabama quoted from the opinion in *State ex rel Clark v. Carter*, 124 Ala. 266, 56 So. 2d 974(6), as follows:

> ". . . Because one section or one provision of an act may be unconstitutional and void does not necessarily render the entire statute or enactment void. If the act can be given operation and effect without such void provision, the valid portions of it will be allowed to stand, unless the Court is unable to say or to know that the Legislature would have passed the act without the void provision; but the Court is relieved of any doubt as to this matter by section 18 of the act in question, which expressly provides that, if any provision of the act shall be void, it shall not affect any other section or provision of the act. [Citations omitted]."

Act No. 819 does not contain a severability clause to aid in its construction as did the act the subject of *State ex rel Clark v. Carter*, but the sections of the Act relating to city

and county employees are complete in themselves. The Act, without question, can be given operation and effect without the contended void provisions and section. The Court cannot conclude that the inclusion of state employee political rights is so important to the plan and operation of Act No. 819 in its entirety to conclude that the Act would not have been adopted without the state employee provisions and section.

As stated above, the Court is of the opinion that even if the contended provisions and section of the Act are void and severed, the Act is not in violation of Section 45 of the Constitution.

The Board next contends and argues that, assuming that Act No. 819 purports to amend Section 25 of the Personnel Board law, then Act No. 819 is in violation of Section 45 of the Constitution on the further grounds that Section 25 as amended was not set out at length. The Board's assumption is apparently based upon the Plaintiffs' construction and argument that Act No. 819 has amended Section 25. The Court does not accept the Plaintiffs' construction or the Board's assumption.

Act No. 819 does not purport to amend Section 25 or make any reference to it or its codified version set out in Section 669, Appendix, Code of Alabama 1958, Recompiled. Section 45 of the Constitution in such regard is not applicable to acts which are independent and complete and intelligible within themselves. *In re Opinion of the Justices*, 262 Ala. 345, 81 So. 2d 277; *In re Opinion of the Justices*, 263 Ala. 653, 83 So. 2d 714; *Boyd v. Edwards*, 284 Ala. 459, 225 So. 2d 853. Act No. 819 is not amendatory in form or substance, but the effect of it upon Act No. 248 is by implication and repeal. For such reasons, the Court concludes that Act No. 819 is not in violation of Section 45 of the Constitution in such regard.

The Board next contends that Act No. 819 violates Sections 106, 107 and 110 of the State Constitution. The premise of this contention is that the Personnel Board law

(Act No. 248) is a local law and that it can only be amended as provided by Section 106.

Section 106 of the State Constitution, within the context of this action, prohibits the Legislature from passing a special or local law without published notice of the intention to apply for such a law.

Section 107 of the State Constitution provides that,

> "The Legislature *shall not, by . . . local law,* repeal or modify any . . . local law except upon notice being given or shown as provided in the last preceding section." (Emphasis added)

Section 110 of the State Constitution provides that,

> "A general law within the meaning of this article [Article IV] is a law which applies to the whole State; a local law is a law which applies to any political subdivision or subdivisions of the State less than the whole; . . ."

From the foregoing constitutional provisions, it is clear that the requirement that notice required by Section 106 applies only to a local law that repeals or modifies a local law and does not apply to a general law that repeals a local law or a part of a local law. Assuming Act No. 248 to be a local law, the Board's contention is rejected. Act No. 819 does not violate Sections 106, 107 and 110 of the State Constitution in such regard.

The Personnel Board next argues that "a general law does not repeal or modify a local or special law although such was passed as a general law." This argument is supported by the Board's citation and analysis of several cases best illustrated by *Conner v. State,* 275 Ala. 230, 153 So. 2d 787 and *Cooper v. State,* 28 Ala. App. 422, 187 So. 500, cert. denied 237 Ala. 533, 187 So. 503.

This principle argued by the Personnel Board in its full statement is that a general law will not repeal by implication a local law *unless there is a manifestation of different intent to be found in the statute. Conner v. State,* supra.

The case of *Shepherd v. Clement*, 244 Ala. 1, 141 So. 255, provides further guidance of the principle, stating,

> "We recognize the rule that the presumption in a general act does not repeal a local statute, but, as has been well said, 'such presumption must give way to a plain manifestation of a different legislative intent.' The question is one of intention which may be made to appear by the subject-matter with which the general act is concerned, by the surrounding circumstances, by other legislation on the same subject, and the purpose to be accomplished. *Thus, where the clear general intent of the Legislature is to establish a uniform system throughout the state, the presumption must be that local acts are intended to be repealed.*" (Emphasis added)

It thus appears that the test is whether Act No. 819 shows a plain manifestation by the Legislature to repeal conflicting statutes relating to political activities of public employees subject to the Personnel Board law.

The rights of citizens of our country and state to engage in the full range of political activities is a constitutionally granted privilege unless it is limited for another constitutionally approved purpose in a lawful manner. Section 25 of the Personnel Board law dealt with one of these latter purposes and similar civil service type statutes have been approved by the Supreme Court of the United States. *Broadrick v. State of Oklahoma*, 413 U.S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1972) and others. The Court judicially knows that, prior to the adoption of Act No. 819, there were other public employee civil service systems in the state applicable to state employees as well as other county and municipal employees and that it hardly needs noting that without a statutory abridgement of political rights, governmental employees enjoy the same political rights as other citizens. Being an employee of government in this State does not, of itself, isolate the employees from political activities.

In this setting, Act No. 819 was adopted. It states its application to all persons in the employment of *any* city or

county or the state, whether classified or not, and expressly repeals *all* laws or parts of laws in conflict.

The Court is, therefore, of the opinion that Act No. 819 shows the clear intent of the Legislature to establish a uniform policy throughout the State relating to the political activities of public employees, notwithstanding the existence of local or general laws to the contrary. The Personnel Board's argument to the contrary is rejected.

The Personnel Board next argues that, under the rule of law of this State, the Plaintiffs cannot accept the benefits of the Civil Service law and challenge its constitutionality. The Court does not disagree with the proposition as cited, but the Personnel Board's attempt to support its contentions with this rule ignores the facts of this action. It is clear and undisputed that the Personnel Board announced by publication and dissemination of its Special Bulletin on June 30, 1978 that, on advice of counsel, the Board challenged the constitutionality of Act No. 819 and asserted therein that the Civil Service law was still in force. The rule cited by the Board has no application to this action.

The Personnel Board next responds to the Plaintiffs' averment in their complaint that there may arise an uncertainty as to the scope of the rights granted by Act No. 819 in respect to participation in campaigns for federal and political party office (Paragraph 11 of the complaint) by arguing that Act No. 819 is void as to certainty.

The issue presented by the Plaintiffs and responded to by the Board is raised by the averments of the complaint (Paragraph 8) that ". . . the Plaintiffs desire to participate (as a campaign worker, not as a candidate) in one or more political campaigns (at the federal, state, and political party level) in the primaries . . ." Each of the named Plaintiffs has filed affidavits in support of their motion for summary judgment to the effect that Section 25 of the Civil Service law as amended by Act No. 819 prohibits public employees from participating in campaigns for the election of candidates for

federal and political party offices, but does not similarly prohibit the Plaintiffs from participating in campaigns for county (or municipal as is applicable) and state offices. Each of the Plaintiffs asserts that they have participated in campaigns for persons seeking election to party, state and federal offices and desire to continue doing so in the future. It appears that the Board's argument as to lack of certainty in Act No. 819 is interposed to these assertions of the Plaintiffs.

Although Act No. 819 does not attempt to enumerate each protected political activity therein, the caption and body of the Act express in clear terms the scope of the Act and the intent of the Legislature. The caption states,

> "To remove *all* restrictions relating to public employees . . . pertaining to his right to participate in certain political activities *and allow employees the right of free expression in public welfare.*" (Emphasis added)

Excepting only the right of the public employee to participate in political activities of a governmental subdivision as that of his employer, the body of the Act expressly provides the right of public employees

> "... to participate in . . . political activities *to the same extent as any other citizen of the State of Alabama . . .*" (Emphasis added)

With this clear legislative directive and law, the Court is of the opinion that Act No. 819 grants to public employees of the counties and cities the right to engage in political campaigns for political party or federal offices.

Having concluded that Act No. 819 grants these rights, the reasoning and opinion as to the repeal of contradictory restrictions in the Personnel Board law and rule is equally applicable in this regard. The Board's argument that Act No. 819 is void for lack of certainty is rejected. The Court is further of the opinion that Act No. 819 is not in violation of the First and Fourteenth Amendments to the United States Constitution or Section 5 of the Constitution of Alabama.

The Personnel Board lastly contends that Act No. 819 is invalidated by the federal Voting Rights Act of 1965. This contended invalidity is rested upon the contention that Act No. 819 has not been approved by the Attorney General of the United States. 42 USC 1973c. This Court is of the opinion that it does not have jurisdiction to adjudicate this issue and that the question must be resolved in an appropriate federal action. The Voting Rights Act placed into law federal scrutiny and review of state and political subdivision ". . . voting qualifications or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964 . . ." No authority has been granted a state court of such review nor have the Defendants cited any such authority. This is a federal issue and must be adjudicated in a federal forum.

For such reason, the Defendant's contention in regard to the Voting Rights Act of 1965 is rejected.

Because of the length of this opinion and the complexity of the issues, the Court's conclusions are summarized as follows:

1. Act No. 819 of the 1978 Regular Session is a valid and constitutional enactment of the Legislature of Alabama insofar as its application to the parties to this action.
2. That the provisions of Section 25 of Act No. 248 of the 1945 Legislature that are inconsistent or contradictory with the rights granted by Act No. 819 as repealed.
3. That public employees subject to the provisions of said Act No. 248 are granted the right to engage in political campaigns for political party and federal offices.

ATTORNEYS FEES

In their prayer for relief, the Plaintiffs have prayed for an award of attorneys fees. Their memorandum submitted as argument for this award argue that the attorneys fees be imposed upon the Defendants. These arguments rest upon

various federal civil rights statutes. Section 14, Voting Rights Act; 42 USC 1988.

It is appropriate to note that the Plaintiffs did not bring this action pursuant to the authority of the federal Voting Rights Act. This issue was raised by the Defendants as a defense. The Court further notes that federal statutory violations were only claimed by the Plaintiffs in respect to the bulletin of the Board. This claim has been adjudicated herein as having not presented a justiciable controversy. For these reasons, the Court does not consider it necessary to rule upon the question of whether these statutes grant attorneys fee authority to a Court of this State.

In Alabama and most other jurisdictions, the general rule is that attorneys fees or expenses of litigation are not recoverable from the opposing parties in the absence of a contractual or statutory duty, or other recognized equitable grounds. *Highlands Underwriters Insurance Company vs. Elegante Inns, Inc.*, 361 So. 2d 1060; *Cincinnati Insurance Company v. City of Talladega*, 342 So. 2d 331; *Hartford Accident & Indemnity Co. v. Cosby*, 277 Ala. 596, 173 So. 2d 585.

There having been no contractual or statutory duty shown for the award of attorneys fees, *the allowance of fees*, if appropriate, *must rest upon recognized equitable grounds.*

In the case of *Sims v. Amos*, 340 F. Supp. 691 (1972), affirmed 93 S. Ct. 290, 409 U.S. 942, 34 L. Ed. 2d 215, the Three-Judge District Court (M.D. Alabama, N.D.) considered and ruled upon the allowance of attorneys fees in connection with a class action that declared that the Alabama Legislature was malapportioned and ordered reapportionment based upon single member districts. In that opinion, the Court said,

> "As to plaintiff's motion for an allowance of attorneys' fees, the rule is well settled that such an award be made in the exercise of the equity powers of the court. (Cita-

> tions omitted) . . . Each case must be decided according to its own peculiar facts."

The *Sims* opinion recognizes that bad faith constituted by arbitrary, unreasonable, or obdurately obstinate behavior of opposing parties is a basis for the taxing of attorneys fees. The *Sims* court based its award on "far broader considerations of equity." In this regard, the Court stated,

> "In instituting the case sub judice, plaintiffs have served in the capacity of '*private attorneys general*' seeking to enforce the rights of the class they represent . . . (Citations omitted). If, pursuant, to this action, plaintiffs have benefited their class and have effectuated a strong congressional policy, they are entitled to attorneys' fees regardless of defendants' good or bad faith." (pg. 694)

The opinion and order of the Court in the case of *Wyatt v. Stickney*, 344 F. Supp. 387 (1972) M.D. Alabama, N.D., also considered an award of attorneys fees against opposing parties. This was an aspect of a class action that resulted in finding that Partlow State School and Hospital was designed to rehabilitate the mentally retarded but was being operated in a constitutionally impermissible fashion. In *Wyatt*, the Court recognized that malfeasance shown in that case constituted bad faith and that such bad faith formed a valid basis for the granting of attorneys fees. The Court there, however, found that a more appropriate justification for attorneys fees evolved ". . . from a kind of benefit theory." citing Mills v. Electro Auto-Lite Co., 396 U.S. 375, 90 S. Ct. 616, 24 L. Ed. 2d 593 (1970). The Court, in *Wyatt*, stated that,

> "Plaintiffs bringing suits to enforce a strong national policy often benefit a class of people far broader than those actually involved in the litigation. Such plaintiffs, who are said to act as '*private attorney general.*' . . . . Consequently, in order to eliminate the impediments to pro bono publico litigation and carry out congressional policy, an award of attorneys' fees not only is essential but also is legally required. (Citations omitted)."

The facts as shown in the present fact do not, in the Court's opinion, measure up to a finding of bad faith. However, it is arguable that the Personnel Board was arbitrary, unreasonable and obdurately obstinate when it asserted in its bulletin that, on advice of counsel, the Board challenged the constitutionality of Act No. 819 and that employees in violation of the Civil Service law will be subject to disciplinary action, without, itself, having sought a court declaration as to the validity of the Act. The Court, however, judicially knows that the Personnel Board is comprised by statute of three public spirited citizens who are willing to give of their time for the public good. In this instance, though, it appears that their action was the result of an overly protective attitude to maintain what they considered to be the integrity and cornerstone of the civil service system.

> "This action falls clearly within the benefit rule. By successfully prosecuting this action, the Plaintiffs have benefited not only the municipal and county employee class who are presently employed but also anyone who will be employed under the Personnel Board law in the future."

The Plaintiffs, in bringing this action, have successfully enforced a public policy of this State regarding the right of public employees to engage in certain political activities. It is not consequential that it is a public policy that is a legislative change from a former policy. The Personnel Board itself is a creature of the Legislature and only derives its authority by legislative enactment. The public policy of the State now is to permit public employees the same political rights, with exceptions, as those of other citizens. The Plaintiffs' action here has been the instrument to accomplish this in Jefferson County. To burden only the Plaintiffs with the expense of litigation not only is unfair but, also, is legally impermissible. *Wyatt v. Stickney*, supra.

Equitable principles require that those who profit should share the expense. In this case, the public will ultimately

profit and the most reasonable way to spread the burden of expense among those benefited is to grant attorneys fees and tax them against the Personnel Board. The result, therefore, would be that such expense would be paid from public funds that are appropriated and administered by the Board. In consideration of the findings herein, the Court sees no occasion that the expense should be taxed to the Defendants in their individual capacities.

The Plaintiffs have not presented at this stage of the action evidence upon which the Court could make a determination and award of attorneys fees. For this reason, it is appropriate that the amount of the attorneys fees to be awarded be the subject of a further hearing. The Court's Judgment here will so provide.

The foregoing opinion resolves all of the issues presented in this action with the exception of consideration and award of the amount of attorneys fees due to be paid to the attorney for the Plaintiffs. Because of the imminence of the federal elections in the coming months, public and individual considerations dictate that the resolved issues be entered as a final judgment at this time and that such not be delayed for award of attorneys fees.

Pursuant to the provisions of Rule 54(b), Alabama Rules of Civil Procedure, the Court finds that there is no just reason for delay in the entry of the matters adjudicated herein as a final judgment as to such matters. It is, therefore, ORDERED, ADJUDGED and DECREED by the Court as follows:

1. The Court finds that all classified employees of Jefferson County and classified employees of the municipalities therein that are subject to the rules and regulations of the Personnel Board of Jefferson County are members of the class that are represented by the named Plaintiffs.

2. That Act No. 819 of the 1978 Regular Session of the Legislature of Alabama is a valid and constitutional enact-

ment of such body insofar as its pronouncements and application to the parties to this action and the class of persons represented by the named Plaintiffs.

3. That the provisions of Section 25 of Act No. 248 of the 1945 Legislature of Alabama, as amended, that are inconsistent or contradictory with the rights granted by the provisions of said Act No. 819 are repealed.

4. That the provisions of Rule 10 of the said Personnel Board that are inconsistent or contradictory with the rights granted by the provisions of said Act No. 819 are declared invalid and void.

5. That the provisions of said Act No. 819 grant to the named Plaintiffs and the class represented by them the right to engage in political campaigns for political party and federal offices.

6. The Defendants, their successors, and their employees, are permanently enjoined from attempting to enforce, enforcing, or threatening to enforce Section 25 of said Act No. 248 or Rule 10 of the Rules and Regulations of the Personnel Board of Jefferson County insofar as the provisions of said Act or Rule are inconsistent or contradictory with the provisions of said Act No. 819 or the declarations adjudged herein.

7. The principals and sureties on the bond filed by the Plaintiffs to secure the preliminary injunction previously entered in this action are released and discharged.

8. The costs incurred to this point of this controversy are taxed to the Personnel Board of Jefferson County.

9. The Court retains jurisdiction of this action for the purpose of consideration and award of attorneys fees to the attorney for the Plaintiffs. This matter will be the subject of further hearing after notice by the Court to the attorneys of the respective parties.

DONE and ORDERED this 20th day of February 1980.

/s/ William A. Thompson
CIRCUIT JUDGE

CC: Honorable Edward Still
Honorable James B. Kierce, Jr.
Honorable W. W. Conwell, Attorney for parties Amicus Curiae

ELIZABETH R. STILL and BILLY GRAY, for themselves and all others similarly situated Plaintiffs	*	CIRCUIT COURT, TENTH JUDICIAL CIRCUIT OF ALABAMA
VS.	*	EQUITY DIVISION
PERSONNEL BOARD OF JEFFERSON COUNTY; JOSEPH W. CURTIN, individually and as Director of the Personnel Board; and HIRAM McKINNEY, individually and as members of the Personnel Board Defendants	*	CASE NO. CV 78 503-740 WAT

ORDER and AMENDMENT TO FINAL JUDGMENT

This action came on to be heard by the Court on motion of the Plaintiffs for award of attorneys fees filed pursuant to the Final Judgment heretofore entered in this action and on motion of the Defendants to alter, amend or vacate Final Judgment.

The Defendants' motion urges the Court to alter, amend or vacate the Final Judgment upon the grounds that it is erroneous as a matter of law, as a matter of fact, and specifically with respest to the Court's ruling that the Plaintiffs are entitled to an award of attorneys fees from the Defendant, Personnel Board of Jefferson County.

The reasons for such award are set forth in full in the opinion portion of this Court's Final Judgment and was based, in large part, on the opinion and ruling in *Sims v. Amos*, 340 F. Supp. 691 (1972) affirmed 93 S. Ct. 290, 409 942, 34 L. Ed. 2d 215. In doing so, this Court also considered the opinion and holding in the case of *Alyeska Pipeline Ser-*

vice Company v. Wilderness Society, 421 U.S. 240, 44 L. Ed. 2d 141 (1975). In attempting to reconcile *Sims* (affirming the award of attorneys fees against the defendant on the "benefit theory") and *Alyeska* (denying attorneys fees on the "private attorney general theory"), this Court distinguished the apparent contradictory rulings on the circumstances that *Sims* enforced a public right *against state government* and *Alyeska* enforced public rights *against a privately owned corporation.* The "benefit theory," appeared to this court, to be appropriate when the wrongdoer was found to be the government and the rights enforced were for the benefit of the public. This distinction squared in the Court's mind and analysis the contradiction of the two cases.

The Supreme Court of this State, however, has rejected an exception to the "American Rule" in denying the award of attorneys fees on the "private attorney general/benefit theory" even when a subdivision of the government was found to be the wrongdoer. This ruling was set forth in *Shelby County Commission v. Smith*, 372 So.2d 1092 (July 6, 1979), but was overlooked previously by this Court and not cited initially by either party here. In *Shelby County Commission v. Smith*, the Supreme Court of Alabama gave accord and adopted the attorneys fee rule set forth in *Alyeska.*

This Court perceives a logical distinction between *Alyeska* and this action, as stated above, but is compelled to follow the clear ruling of the Supreme Court of Alabama.

For such reasons, the aspect of this Court's Final Judgment holding that the Plaintiffs are entitled to an award of attorneys fees from the Defendant, Personnel Board, and retaining jurisdiction for such purpose is due to be vacated and the Final Judgment amended to reflect such effect. For the same reasons, the motion of the Plaintiffs for award of attorneys fees is due to be denied.

It is, therefore, ORDERED, ADJUDGED and DECREED by the Court as follows:

1. The motion of the Plaintiffs for award of attorneys fees is hereby denied.

2. The opinion and paragraph 9 of the decretal portion of the Final Judgment entered by this Court on February 20, 1980, relating to the award of attorneys fees to the Plaintiffs are hereby vacated and the said paragraph 9 is amended to provide as follows:

"9. The prayer for relief of the Plaintiffs for an award of attorneys fees to be paid by the Defendants is denied."

DONE and ORDERED this 16th day of June 1980.

/s/ William A. Thompson
CIRCUIT JUDGE

CC: Honorable Edward Still
Honorable James B. Kierce, Jr.
Honorable W. W. Conwell, Attorney for Parties Amicus Curiae

THE STATE OF ALABAMA – JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
SPECIAL TERM, 1981

Elizabeth R. Still, et al.

79-824 v.

Personnel Board of Jefferson County, et al.
Appeal from Jefferson Circuit Court

ALMON, JUSTICE.

This is an appeal from a judgment denying the award of attorneys' fees.

Two classified civil service employees, as representatives of a class, sought an injunction and declaratory relief to determine the scope of the restrictions on their political rights contained in Code 1975, § 17-1-7, as they conflict with similar restrictions in the civil service law of Jefferson County. The Jefferson County Personnel Board adopted as its own rule the same restrictions contained in the civil service law entitled Rule 10, "Prohibited Activity."

In essence, the rule prohibits a classified employee from participating in any national, state or local political activities or campaigns "except to exercise his right as a citizen privately to express his opinion and to cast his vote." In comparison, § 17-1-7, passed during the 1978 Regular Session, provides that the employees shall have the right to participate in city and state political activities as any other Alabama citizen, except they are prohibited from engaging in political activities on the same level of government in which they are employed. This section also permits them to join local political clubs and organizations and state or national political parties. Recognizing the conflict between these two acts, the Personnel Board posted a Special Bulletin, as notice to its employees, that it challenges the consti-

tutionality of § 17-1-7, believing that the restrictions in its Rule 10 are in force, and that any violation of that Rule will be subject to disciplinary action.

Plaintiffs brought an action to enjoin the Personnel Board from denying them their political rights granted under § 17-1-7. The first cause of action alleged that the Special Bulletin violated the 1st and 14th Amendments to the United States Constitution, Section 4 of the Alabama Constitution and 42 U.S.C. § 1983. The second count asserted that the Special Bulletin, Personnel Board Rule 10 and the civil service law violated § 17-1-7. Lastly, they alleged that when read together, § 17-1-7 and the civil service law denied them their right to campaign for political parties or federal offices, violating the equal protection and freedom of speech and association clauses of the United States and Alabama Constitutions. They requested costs and reasonable attorneys' fees in their prayer for relief.

The court, in its decree, specifically stated that "according to the position and contentions of the parties, the bulletin itself does not present a justiciable controversy." Hence, the Plaintiffs' first cause of action, the only cause that asserted federal statutory violations, was held not justiciable. The court further stated that § 17-1-7 is constitutional as applied to the parties; that the provisions of Rule 10 and the civil service law that were inconsistent or contradictory with § 17-1-7 were repealed; and that public employees subject to the provisions of § 17-1-7 were entitled to engage in political campaigns for political party and federal offices. The court initially awarded attorneys' fees based upon the "private attorney general/benefit theory." However, the court subsequently decided the Plaintiffs were not entitled to such fees and amended its final judgment to so reflect.

In their brief the Plaintiffs properly state the issue to be as follows:

> May an Alabama court grant attorneys' fees under the authority of a federal statute, even when its decision to grant all relief sought is based on state causes of action rather than federal ones?

The first case relied on is *Maine v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed. 2d 555 (1980). The precise issue in *Thiboutot* was whether 42 U.S.C. § 1983 encompasses claims based on purely statutory violations of federal law and if so, whether attorneys' fees under 42 U.S.C. § 1988 could be awarded the prevailing party when the action was filed in state court. The United States Supreme Court answered in the affirmative.

The second case relied on by the Plaintiffs is *Maher v. Cagne*, [*sic*] 448 U.S. 122, 100 S.Ct. 2570, 65 L.Ed. 2d 653 (1980). *Maher* dealt with the issue as to whether a court's authority to award attorneys' fees is limited to cases where § 1983 is invoked as a remedy for a constitutional violation or a violation of a federal statute providing for the protection of civil rights or equal rights. The violation in *Maher* concerned the Social Security Act. Neither case relied on addresses the precise issue presented here. In this case, the only alleged violation of a federal statutory right involved the Personnel Board's Special Bulletin. The court specifically considered the allegation and held it did not present a justiciable controversy. Hence, this case is distinguishable from the two cases cited.

The question presented is whether a party that asserts both a federal and a state cause of action and does not prevail on the federal cause but does on the state cause, is entitled to an award of attorneys' fees under the federal statute. Our answer to this question is in the negative. The Plaintiffs have not cited any case, nor have we found a case, where a state court awarded attorneys' fees under a federal cause of action when the party did not prevail on such ac-

tion. It is our opinion that a state court is not required to award attorneys' fees to a party that prevails on state grounds only, regardless of what other federal claim is attached thereto. *Shelby County Commission v. Smith*, 372 So. 2d 1092 (Ala. 1979).

The trial court's decision is not based on constitutional grounds but merely on the language of § 17-1-7. As such, there is no federal statutory or constitutional grounds to allow the award of attorneys' fees.

Therefore, the judgment denying Plaintiffs' attorneys' fees is affirmed.

AFFIRMED.

Torbert, C. J., Faulkner and Embry, JJ., concur.

Jones, J., concurs specially.

JONES, JUSTICE (Concurring specially).

I concur specially in order to emphasize the underlying basis for the holding denying an award of attorneys' fees. Not only did the trial judge grant Plaintiffs' relief solely on state grounds but he specifically denied relief on all asserted federal grounds. Our holding is *not* premised on the mere affirmative grant of Plaintiffs' state grounds relief; rather, it is premised on the trial court's affirmative denial of federal grounds relief.

I, J. O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.

Witness my hand this 11 day of Sept., 1981

/s/ J. O. Sentell

Clerk, Supreme Court of Alabama